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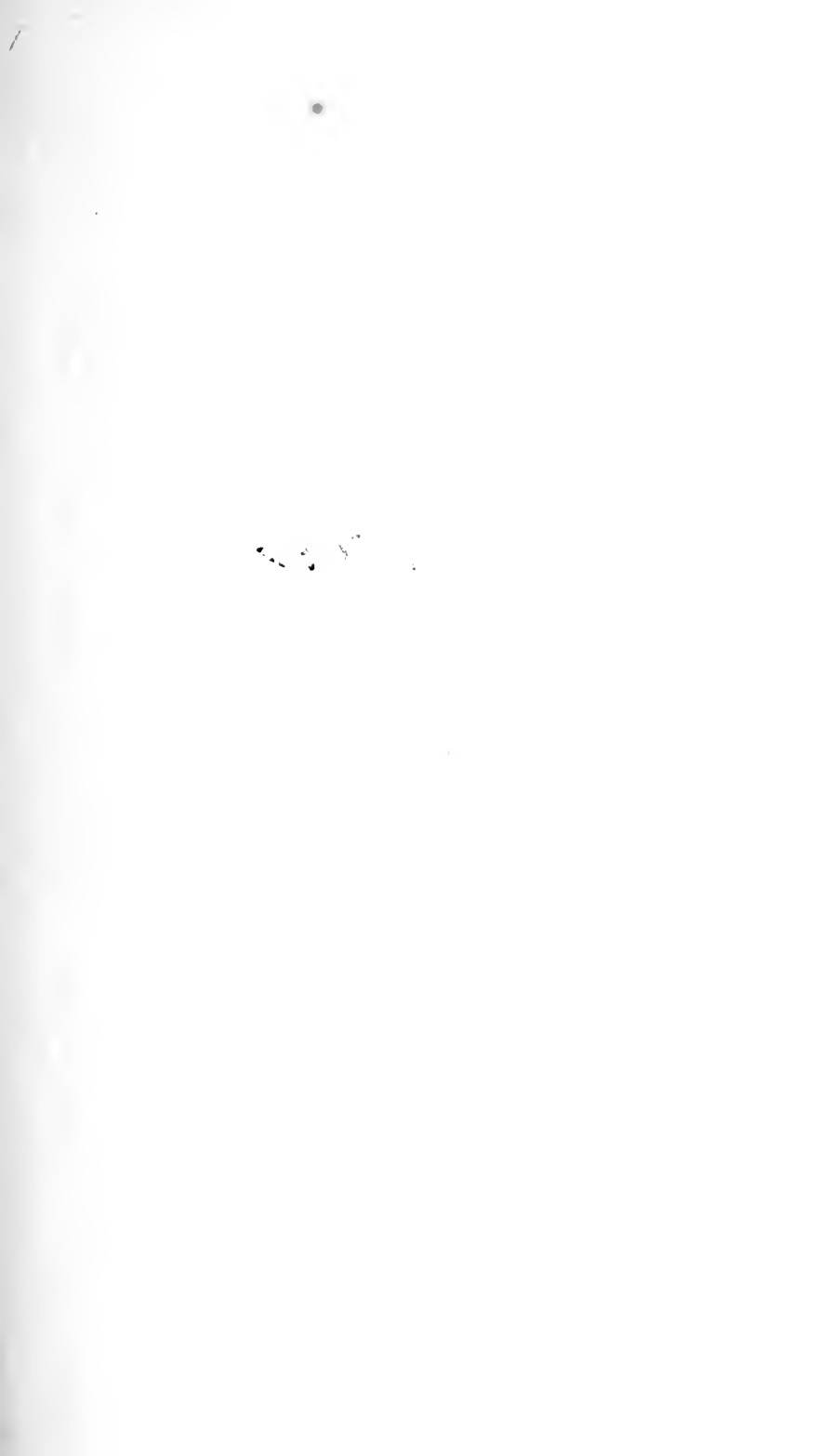
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2663
No. 12697

United States
Court of Appeals
for the Ninth Circuit.

HARCRAFT CO., a Corporation,

Appellant,

vs.

PAPER CONTAINER MANUFACTURING CO.,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.



No. 12697

**United States
Court of Appeals
for the Ninth Circuit.**

HARCRAFT CO., a Corporation,

Appellant,

vs.

PAPER CONTAINER MANUFACTURING CO.,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HAROLD LARSON,

FLEMING, ROBBINS & TINSMAN,

210 West Seventh St.,

Los Angeles 14, Calif.

For Appellee:

SHEPPARD, MULLIN,

RICHTER & BALTHIS,

458 S. Spring St.

Los Angeles 13, Calif.

In The United States District Court for
the Southern District of California
Central Division

No. 11432-Y

HARCRAFT CO., a Corporation,
Plaintiff,

vs.

PAPER CONTAINER MANUFACTURING CO,
a Corporation,
Defendant.

PETITION FOR REMOVAL

To the Honorable United States District Court for
the Southern District of California, Central
Division:

Your petitioner, Paper Container Manufacturing Co., a corporation, organized and existing under and by virtue of the laws of the State of Illinois, respectfully shows to this Honorable Court:

I.

That your petitioner is the defendant in the above-entitled action which has been commenced in the Superior Court of the State of California in and for the County of Los Angeles, said action being number 561656; that a copy of the summons and complaint in the above-entitled matter was served upon the statutory agent of your petitioner on the 6th day of April, 1950, in the County of Los Angeles, and that your petitioner has not yet appeared

in answer to the summons and complaint so served upon it, or filed any pleading in said action, and that twenty (20) days after service of process upon your petitioner have not expired.

II.

That said petitioner files its petition for removal of said cause from the aforesaid Superior Court, in which it is now pending, to the United States District Court for the Southern District of California, Central Division, held in the City of Los Angeles, State of California.

III.

That the said action commenced has been commenced as aforesaid and that said action is a civil action of which the United States District Court has original jurisdiction; that in the said action Harcraft Co., a corporation, as plaintiff seeks to recover a judgment from the defendant, petitioner herein, for a sum of money alleged to be due under an alleged conditional sales contract averred to have been entered into between the plaintiff and defendant, and prays damages in the amount of Thirteen Thousand Eight Hundred Seventy-three and 28/100 Dollars (\$13,873.28), together with such other alleged additional sums as may become due and payable under said alleged conditional sales agreement subsequent to the filing of said complaint.

IV.

That petitioner, Paper Container Manufacturing Co., a corporation is a corporation organized and

existing under and by virtue of the laws of the State of Illinois; that said Paper Container Manufacturing Co., a corporation, was at all times mentioned in the complaint, and now is, a resident and citizen of the State of Illinois.

V.

That said complaint alleges that plaintiff, Harcraft Co., a corporation, is a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business in the City of Los Angeles, State of California; that your petitioner is informed and believes and therefore alleges that plaintiff, Harcraft Co., a corporation, was and now is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the State of California, and is a resident and citizen of the State of California.

VI.

That the controversy herein is now and at the time of the commencement of said suit was one wholly between citizens of different states, to wit, plaintiff herein, a citizen and resident of the County of Los Angeles, State of California, and your petitioner herein, a corporation organized and existing under and by virtue of the laws of the State of Illinois and a citizen and resident of the State of Illinois; that as aforesaid at the time of the commencement of said suit, your petitioner was and

still is a citizen and resident of the State of Illinois and a non-resident of the State of California.

VII.

That the matter in dispute exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs, to wit the sum of Thirteen Thousand Eight Hundred Seventy-three and 28/100 Dollars (\$13,873.28), being the amount of damages claimed by the plaintiff from the defendant, petitioner herein.

VIII.

Your petitioner herein files and offers a good and sufficient bond under the statutes in such cases made and provided, conditioned as the law directs that your petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that this case was not removable or was improperly removed.

IX.

That there are attached to this petition a copy of all process and pleadings and orders served upon your petitioner herein.

PAPER CONTAINER
MANUFACTURING CO.,

By HENRY F. PRINCE,

FREDERIC H. STURDY,

By /s/ FREDERIC H. STURDY,
Attorneys for Defendant and Petitioner Paper Container Manufacturing Co., a Corporation.

GIBSON, DUNN & CRUTCHER,

By /s/ FREDERIC H. STURDY,
Of Counsel.State of California,
County of Los Angeles—ss.

Frederic H. Sturdy, being first duly sworn, on behalf of the defendant, Paper Container Manufacturing Co., a corporation, in the above-entitled matter, says:

That he has read the foregoing petition for removal and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true; that the officers of said defendant are absent from the County of Los Angeles where its said attorneys reside and that the affiant is one of the attorneys for the defendant, Paper Container Manufacturing Co., a corporation, and is a member of the firm of Gibson, Dunn & Crutcher, which firm is counsel for the said defendant, and he therefore makes this verification in behalf of said defendant.

/s/ FREDERIC H. STURDY.

Subscribed and sworn to before me this 13th day of April, 1950.

[Seal] /s/ ELLEN WERTZ,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Sept. 29, 1950.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 561656

HARCRAFT CO., a Corporation,

Plaintiff,

vs.

PAPER CONTAINER MANUFACTURING CO.,
a Corporation,

Defendant.

SUMMONS

Action brought in the Superior Court of the County
of Los Angeles, and Complaint filed in the Of-
fice of the Clerk of the Superior Court of said
County.

The People of the State of California Send Greet-
ings to:

Paper Container Manufacturing Co., a corpora-
tion, Defendant.

You are directed to appear in an action brought
against you by the above-named plaintiff in the
Superior Court of the State of California, in and
for the County of Los Angeles, and to answer the
Complaint therein within ten days after the service
on you of this Summons, if served within the County
of Los Angeles, or within thirty days if served else-
where, and you are notified that unless you appear
and answer as above required, the plaintiff will
take judgment for any money or damages demanded
in the Complaint, as arising upon contract, or will

apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 28th day of June, 1949.

L. E. LAMPTON,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

[Seal] /s/ By K. MEACHEM,
Deputy.

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 561656

HARCRAFT CO., a Corporation,

Plaintiff,

vs.

PAPER CONTAINER MANUFACTURING CO.,
a Corporation,

Defendant.

COMPLAINT
(For Money)

Comes now Plaintiff, Harcraft Co., and complains of defendant and for cause of action alleges:

I.

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California with its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

II.

That plaintiff is informed and believes and, therefore alleges that the defendant is an Illinois corporation, duly authorized to transact business in the State of California and transacting business in the City of Los Angeles, County of Los Angeles, State of California.

III.

That on or about the 12th day of June, 1942, the plaintiff and defendant entered into a Conditional Sales Agreement, a copy of which is hereto attached, marked "Exhibit A" and made a part hereof as though specifically set forth in full herein. That at the time of the execution of said Conditional Sales Agreement defendant delivered to the plaintiff a check in the sum of Fifteen Thousand (\$15,000.00) Dollars, as provided therein, and at said time it was specifically understood and agreed by and between the plaintiff and defendant that if this Conditional Sales Agreement was not ratified and approved by the Board of Directors of de-

defendant corporation as well as authorize the execution of the notes as provided in said Agreement, and the defendant so notified the plaintiff within the ten (10) days thereafter by telegraph addressed to the plaintiff at 6200 Avalon Boulevard, Los Angeles, California, and confirmed by letter, Registered Mail, of the same date, then and in such event the fifteen thousand dollars paid to the plaintiff upon the execution of the Agreement, as therein provided, would be returned to the defendant, as well as the copy of said Agreement so executed by the President of defendant corporation on its behalf on or about said 12th day of June, 1942, and further understood and agreed that defendant's executed copy of said Agreement would be mailed to Cromwell, Greist & Warden, Chicago, Illinois, who plaintiff was informed were the attorneys for the defendant corporation, as escrow holder, with instructions to the effect they be authorized to deliver said contract to the defendant at any time within ten (10) days upon their forwarding to plaintiff, duly executed by the defendant, the eighteen (18) promissory notes referred to in said Agreement, as well as a certified copy of the resolution of the Board of Directors of defendant corporation ratifying and approving the act of the President in executing said Agreement for and on behalf of the defendant, also authorizing the execution and delivery of said eighteen (18) notes as specifically provided in said conditional sales agreement. It was also at that time understood and agreed by and between plaintiff and defendant that if the sale as provided in said Conditional Sales Agreement was consummated and

plaintiff entitled to retain the fifteen thousand dollars on or about the 12 day of June, 1942, paid to the plaintiff as provided for in said Conditional Sales Agreement and as part of the consideration for the execution of said agreement, the plaintiff would cause to be executed in favor of defendant options to purchase the twelve hundred (1200) shares of the stock of defendant corporation owned by the plaintiff or by Leo M. Harvey or Ben Weingart, which options if given would be executed by the record owner of said stock, which would be either the corporation or said Leo M. Harvey or Ben Weingart, all as more fully appears from the written document which plaintiff on or about said 12th day of June, 1942, executed and delivered to the defendant, a copy of which is hereto attached and marked "Exhibit B" and made a part hereof as though specifically set out herein.

IV.

That pursuant to said understanding and agreement, as above described and particularly set forth in said "Exhibit B," Harold Larson, the Secretary of and attorney for the plaintiff corporation, did forward to said Cromwell, Greist & Warden, on or about said 12th day of June, 1942, an executed copy of the Conditional Sales Agreement so executed on or about the 12th day of June, 1942, as aforesaid, which Agreement, however, bore date the 10th day of June, 1942, also forwarded with said Agreement to said escrow holder eighteen (18) unexecuted promissory notes, being the promissory notes which if the Conditional Sales Agreement was to become opera-

tive would be executed by the defendant and delivered to the plaintiff, as particularly set forth in said Conditional Sales Agreement. That said documents were forwarded to said Cromwell, Greist & Warden by said Harold Larson under written instructions, a copy of which is hereto attached and marked "Exhibit C" and made a part hereof as though specifically set out and embodied herein, under which written instructions said escrow holder was authorized to deliver said executed Agreement to the defendant, provided said escrow holder had within ten days delivered to the plaintiff the eighteen (18) unexecuted promissory notes forwarded to said escrow holder, as above set forth, duly executed by the defendant corporation, a certified copy of the resolution of the Board of Directors of the defendant corporation ratifying and approving the action of the President in executing said Conditional Sales Agreement on its behalf and authorizing the execution on behalf of the defendant corporation of said eighteen notes. That within the said ten days as provided in said escrow instructions, said escrow holder did forward to the plaintiff the eighteen notes executed by the defendant corporation and a certified copy of the resolution of the Board of Directors of the defendant corporation ratifying and approving the action of the President in executing said Conditional Sales Agreement and authorizing the execution on behalf of the defendant corporation of said eighteen notes. That upon the receipt of said notes, duly executed, as aforesaid, and the certified copies of

the resolutions, as aforesaid, plaintiff cashed the defendant's fifteen thousand dollar check theretofore on or about the 12th day of June, 1942, given to it by the President of the defendant corporation at the time of the execution of said Conditional Sales Agreement, as above set forth, and did thereafter cause Leo M. Harvey and Ben Weingart, the record owners of the twelve hundred (1200) shares of stock of defendant corporation, above referred to and as particularly set out in "Exhibit B," to execute and cause to be delivered to the defendant the option to purchase said twelve hundred (1200) shares of stock, all as set forth in said "Exhibit B." The original of said "Exhibit B" was delivered to the defendant on or about the 12th day of June, 1942, by delivering the same to Leo J. Hulsman, its President, at the time he, on behalf of the defendant corporation, executed said Conditional Sales Agreement marked "Exhibit A."

V.

That pursuant to the terms of said Conditional Sales Agreement so executed on or about the 12th day of June, 1942, although dated the 10th day of June, 1942, which became operative and binding on both the parties thereto upon the ratification and approval thereof by the Board of Directors of the defendant corporation as confirmed by the certified copy of the resolution forwarded to plaintiff, as above set forth, plaintiff agreed to sell and defendant agreed to buy six (6) completed machines designed for the manufacture of one piece pleated paper cups, together with three sets of

dies, which machines were at the time of the execution of said Agreement located in plaintiff's place of business at 6200 Avalon Boulevard, Los Angeles, California, which machines had prior to the execution of said agreement been inspected by the buyer and accepted in the condition they then were, subject only to the warranties made by the plaintiff as set forth in said Agreement, being "Exhibit A," for the total sum of Sixty Thousand (\$60,000.00) Dollars, fifteen thousand (\$15,000.00) dollars upon the execution of the Agreement, which sum was represented by the fifteen thousand dollar check given by the defendant to the plaintiff upon the execution of said agreement and which check, pursuant to the understanding and agreement of the parties, as confirmed by said "Exhibit B," was to be returned to the defendant if the Board of Directors of said defendant corporation did not ratify and approve the action of the President in execution said agreement within the time and in the manner as set forth in said "Exhibit B" and "Exhibit C," fifteen thousand (\$15,000.00) Dollars to be evidenced by the eighteen (18) promissory notes herein referred to and particularly set forth in each of the exhibits hereto attached, and Thirty Thousand (\$30,000.00) Dollars to be evidenced as follows:

(1) A sum equal to five cents (5c) for each one thousand (1,000) souffle cups produced on such machines that are sold by the Buyer at the net price of One (\$1.00) Dollar or more per thousand (1,000); and

(2) A sum equal to five per cent. (5%) of the Buyer's net selling price on souffle cups produced on such machines that are sold by the Buyer at the net price of less than One (\$1.00) Dollar, and more than fifty cents (50c) per thousand; and

(3) A sum equal to one per cent. (1%) on any souffle cups sold by Buyer at the net price of fifty cents (50c) per thousand or less; and

(4) A sum equal to five cents (5c) per thousand for each one thousand (1,000) drinking cups, or other contains other than souffle cups produced on such machines that are sold by Buyer at the net price of One (\$1.00) Dollar, or more, per thousand; five per cent. (5%) of the net selling price when sold at a price of less than One (\$1.00) Dollar per thousand but at a price of ninety (90c) cents or more, and one per cent. (1%) of the net selling price when sold for less than ninety (90c) cents per thousand;

said sum so payable to be paid on or before the 10th day of the month following the month in which the cups were produced and in the event said payments do not amount to the sum of Thirty-six Hundred (\$3600.00) Dollars for any successive twelve (12) month period, beginning September 1, 1942, then and in that event on or before the 20th day of the month following said twelfth month of each year the defendant should pay such sum as said payments made for said twelve months period were less than the sum of Thirty-six Hundred

(\$3600.00) Dollars, until such a time as said Thirty Thousand (\$30,000.00) Dollars should have been fully paid.

VI.

That said machines and dies covered by said Conditional Sales Agreement were delivered to the defendant within the time and manner as provided for in said Conditional Sales Agreement, and defendant paid the Fifteen Thousand (\$15,000.00) Dollars upon the execution of the Agreement, as above set forth, executed the eighteen (18) promissory notes as set forth in said Agreement aggregating the sum of Fifteen Thousand (\$15,000.00) Dollars, which notes have also been paid, and on account of said last Thirty Thousand (\$30,000.00) Dollars of said purchase price to be payable as above set forth defendant has paid the following sums, and no more:

The Thirty-six hundred (\$3600.00) dollars minimum for the year ending August 31, 1943; the Thirty-six hundred (\$3600.00) dollars minimum for the year ending August 31, 1944; and Five Hundred Twenty-six and 72/100 (\$526.72) Dollars on account of the minimum thirty six hundred dollars due for the year ending August 31, 1945, leaving now unpaid the sum of Three Thousand Seventy-three and 28/100 (\$3,073.28), being the balance of the minimum due and payable for the year ending August 31, 1945; Thirty-six Hundred (\$3600.00) Dollars, being the minimum for the year ending August 31, 1946, and Thirty-six Hundred (\$36.00.00)

Dollars, being the minimum for the year ending August 31, 1947 and Thirty-six Hundred (\$3600.00) Dollars, being the minimum for the year ending August 31, 1948, making a total of Thirteen Thousand Eight Hundred Seventy-three and 28/100 (\$13,873.28) Dollars now past due, no part of which has been paid.

VII.

That demand has been made on the defendant for the payment of said sum of Thirteen Thousand Eight Hundred Seventy-three and 28/100 (\$13,873.28) Dollars, but the defendant has failed, neglected and refused, and still fails, neglects and refuses to pay said sum, or any part thereof, and the whole thereof is still due, owing and unpaid.

VIII.

Wherefore, plaintiff prays judgment against the defendant for the sum of Thirteen Thousand Eight Hundred Seventy-three and 28/100 (\$13,873.28) Dollars, together with such other additional sums as may become due and payable under said Conditional Sales Agreement subsequent to the filing hereof, together with interest at the rate of seven per cent. (7%) on said respective installments from the due date, for costs of suit, and such other and further relief as to the Court may seem meet.

Dated this 20th day of June, 1949.

/s/ HAROLD LARSON,
Attorney for Plaintiff.

Exhibit B

Harcraft Co.
6200 Avalon Boulevard
ADams 6206
Los Angeles, California
June 12, 1942

Paper Container Manufacturing Co.,
1752 East 75th Street,
Chicago, Illinois.

Dear Sirs:

Simultaneously herewith your President has executed on your behalf a conditional sales contract wherein you are designated as the Buyer and we are designated as the Seller, and given us a check for \$15,000.00, as provided for therein.

If this contract is not ratified and approved by your Board of Directors, as well as the execution of the notes as provided for therein, it is our understanding you may, at any time within ten (10) days from the date hereof so advise us by telegraph, addressed to the undersigned at 6200 Avalon Boulevard, Los Angeles, California, and confirmed by letter, Registered Mail, of the same date, so notify us, in which event said \$15,000.00 shall forthwith be returned to you, as well as the copy thereof executed by your President.

It is our further understanding that we are executing a copy of said agreement which is being mailed to Cromwell, Greist & Warden, as escrow holders, with instructions to the effect that they

are authorized to deliver said contract to you any time within ten days, upon their forwarding to us, duly executed by your Company, the eighteen (18) promissory notes referred to in said agreements, which notes so to be executed are being forwarded to them simultaneously with said contract, and forward to us a certified copy of a resolution adopted by your Board of Directors, at a meeting duly and regularly held, ratifying and approving the act of the President in executing said agreement for and on your behalf, and authorizing the execution and delivery of said eighteen notes. The form of said proposed resolution is also being forwarded to said escrow holder.

This is also to confirm our understanding which is that if the purchase of said six machines specified in said agreement is consummated and said machines shipped, and we entitled to retain the \$15,000.00 this day paid, as provided for in said agreement, then and in such event we will immediately thereafter forward you an option or options to purchase the twelve hundred (1200) shares of your stock owned by the undersigned, or Leo M. Harvey or Ben Weingart, upon the same terms and conditions as that certain option given and granted you under the agreement entered into between us on the 9th day of December, 1941, which said option or options will be executed by the record owner of said stock, which

may be either the undersigned, or said Harvey or Weingart.

Very truly yours,

HARCRAFT CO.

By LEO M. HARVEY,
President.

Exhibit C

Law Offices Harold Larson
814-816 Central Building
Los Angeles 14
TRinity 1196

June 12, 1942.

Cromwell, Greist & Warden,
Attorneys at Law,
First National Bank Bldg.,
Chicago, Illinois.

In re: Paper Container—Harcraft Co.

Dear Sirs:

By the time you receive this, I presume Mr. Hulseman will have returned to Chicago and informed you how the deal has been handled and has shown you the letter which we executed and delivered to him confirming our understanding.

Pursuant to our verbal understanding with Mr. Hulseman, I am enclosing herewith an executed copy of the conditional Sales Agreement dated the 10th day of June, 1942, between Paper Container Manufacturing Co., as buyer and Harcraft Co., as seller, which agreement has been duly executed by Leo

J. Hulseman, as President, on behalf of Paper Container, and by Leo M. Harvey, as President and Harold Larson, as Secretary, on behalf of Harcraft Co. I am also enclosing herewith 18 unexecuted promissory notes, also for certification a proposed resolution to be adopted by the Board of Directors of Paper Container ratifying and approving the action of the President in executing said agreement, and authorizing the execution on behalf of the Company of the eighteen notes by either the President or Secretary.

This executed agreement is being forwarded you as escrow holder and you are authorized to deliver the same to Paper Container Co. within ten days, provided prior to such delivery to it of said agreement you have delivered to us the 18 notes duly executed on behalf of Paper Container by the officer or officers so authorized to do under the resolution adopted by the Board, and deliver to us a certified copy of the resolution in the form enclosed herewith for such certification.

These are forwarded you upon the express understanding that if the instructions are not complied with within ten days from this date, then and in that event we have the absolute right to at any time thereafter demand and be entitled to the return to us of said executed agreement enclosed herewith.

I believe the letter executed by Mr. Harvey on behalf of Harcraft Co. addressed to Paper Container which was delivered to Mr. Hulseman, clearly sets forth the mechanics under which we are proposing to close the deal.

You might call Mr. Hulseman's attention to the fact that in the rush of preparing a copy of the agreement so executed for him to take with him I believe we overlooked changing the dates appearing in lines 6 and 7 on page 2 to conform to the changes made in the executed copy.

Kindly acknowledge receipt of the enclosures.

Very truly yours,

HAROLD LARSON.

HL:E

Exhibit A

Conditional Sales Agreement

This Agreement, made and entered into at Los Angeles, California, this 10th day of June, 1942, by and between Paper Container Manufacturing Co., hereinafter referred to as Buyer, and Harcraft Co., a California corporation, hereinafter referred to as Seller:

Now, Therefore, in consideration of the mutual covenants herein contained the parties do hereby covenant and agree as follows:

I.

Seller hereby agrees to sell and Buyer agrees to buy from the Seller six (6) completed machines designed for the manufacturing of one piece pleated paper cups, together with three sets of dies, which machines are now located at Seller's place of business at 6200 Avalon Boulevard, Los Angeles, California, and have been inspected by the Buyer and accepted by him in the condition they now are, sub-

ject, however, to the warranties made by the Seller as hereinafter set forth, upon the terms and conditions hereinafter set forth.

II.

Consideration

As purchase price for said machines, Buyer shall pay to the Seller the sum of Thirty Thousand (\$30,000.00) Dollars (with interest on deferred payments as hereinafter provided) as hereinafter in subsection (A) of this paragraph provided, plus the additional payments as hereinafter in subsection (B) provided.

(A) The Thirty Thousand (\$30,000.00) Dollars shall be payable as follows:

Mode of Payment

Fifteen Thousand (\$15,000.00) Dollars upon the execution of this Agreement, the receipt whereof is hereby acknowledged; balance of said Thirty Thousand (\$30,000.00) Dollars, to wit, Fifteen Thousand (\$15,000.00) Dollars, together with interest on deferred payments, shall be payable Eight Hundred Thirty-three (\$833.33) Dollars on the 1st day of August, 1942, and a like sum on or before the 1st day of each and every month thereafter until said Fifteen Thousand (\$15,000.00) Dollars, together with interest on deferred payment shall have been fully paid.

Notes and Interest

Said Fifteen Thousand (\$15,000.00) Dollars bal-

ance of said Thirty Thousand (\$30,000.00) Dollars, payable as above set forth, shall be evidenced by promissory notes payable and bearing interest as follows: Eighteen (18) serial notes, in the form hereto attached, each for \$833.33, dated as of this date, bearing interest at the rate of five per cent. (5%) per annum from June 15, 1942, until paid, first of said notes to become due and payable on August 1st, 1942, and one thereof due and payable on the 1st day of each and every month thereafter until January, 1944, when the last of said notes shall become due and payable.

Additional Consideration

(B) The additional payments to be paid by the Buyer, irrespective of who may be making said cups on said machines, whether it be the Buyer, an affiliated or subsidiary company, associates or other persons, firms or corporations, shall be and be payable as follows:

(1) A sum equal to five cents (5c) for each one thousand (1000) souffle cups produced on such machines that are sold by the Buyer at the net price of One (\$1.00) Dollar or more per thousand (1,000); and (2) A sum equal to five per cent. (5%) of the Buyer's net selling price on souffle cups produced on such machines that are sold by the Buyer at the net price of less than One (\$1.00) Dollar, and more than fifty cents (50c) per thousand; and (3) A sum equal to one per cent. (1%) on any souffle cups sold by Buyer at the net price of fifty cents

(50c) per thousand or less; and (4) A sum equal to five cents (5c) per thousand for each one thousand (1,000) drinking cups, or other containers other than souffle cups produced on such machines that are sold by Buyer at the net price of One (\$1.00) Dollar, or more, per thousand; five per cent. (5%) of the net selling price when sold at a price of less than One (\$1.00) Dollar per thousand but at a price of ninety (90c) cents or more, and one per cent. (1%) of the net selling price when sold for less than ninety (90c) per thousand.

Reports

Sums payable on the basis of cup production shall be reported and paid each month on or before the twentieth (20th) day of the month next following the month in which the cups are produced. Reports shall be verified and shall show the total number of cups or containers that were manufactured on said machines and sold during the month covered by the report and the net prices at which the same were sold.

Annual Minimums

The monthly payments covering said additional payments shall be made and continue in full force and effect until the additional sum of Five Thousand (\$5,000.00) Dollars as to each of said six machines, making a total of Thirty Thousand (\$30,000.00) Dollars shall have been fully paid, and in the event said additional payments made do not amount to the sum of Thirty-six Hundred (\$3600.00) Dollars for any successive twelve month period, beginning

September 1, 1942, then and in that event on or before the twentieth day of the month following said twelfth month of each year, the Buyer shall pay to the Seller such sum, if any, as said payments made covering said twelve month period are less than the sum of Thirty-six Hundred (\$3600.00) Dollars.

If because of war, strike or other cause beyond Buyer's control, the Buyer is prevented from operating one or more of said machines, then and in that event there shall be a proportionate adjustment and postponement in part in said minimum payments to be paid as provided in this paragraph; irrespective of any adjustment or postponement, however, the total sum of Thirty Thousand (\$30,000.00) Dollars shall be payable as herein provided, except as to such postponement in part, as hereinbefore provided.

III.

Warranty

(a) Each machine is guaranteed against defect in material and workmanship for a period of ninety (90) days. Seller's liability is hereby strictly limited to replacing broken or defective parts. Delivery of said parts to a carrier consigned to Buyer, shall be full and complete compliance of this promise to replace such parts. Special damages are not within the contemplation of the parties and Buyer shall not be liable therefor under any circumstances.

(b) Failure of Seller to promptly and expeditiously repair or replace defective parts and furnish all necessary parts to repair defective parts

on request of Buyer, then Buyer may make such repairs or replacements and deduct the cost thereof from payments due the Seller, during 90-day guarantee period.

(c) In case of defect due to inferior material or workmanship discovered, and Seller given written notice thereof, during said 90 day period, the length of said warranty and guarantee period shall be extended by such time as any machine shall be inoperative because of such defect.

Title

Provided Buyer has theretofore, strictly at the time and in the manner herein provided, complied with all the terms, covenants and conditions on its part to be kept and performed under the provisions of paragraph II hereof as to each machine agreed to be purchased hereunder, then and in that event when Buyer shall have paid to the Seller the total sum of Sixty Thousand (\$60,000.00) Dollars, as provided for in subsections (A) and (B) of paragraph II hereof, the Buyer shall thereupon receive complete title to all machines sold it hereunder.

It is expressly understood and agreed that legal title to said machines, and each of them, shall at all times until Buyer may become the legal owner as hereinbefore provided remain in the Seller, and that the Buyer's right to the continued possession and use of said machines, and each of them, in the meantime, is conditioned upon Buyer complying with all the terms, covenants and conditions hereof

strictly at the time and in the manner as herein set forth, and upon default by the Buyer in the performance of any of the terms, covenants and conditions on its part to be kept and performed, strictly at the time as herein set forth, the Buyer shall have no further right to the use or possession of any of said machines, and in such event the Seller shall become entitled to the immediate possession of each and all of said machines. As to any defaults hereunder, other than the payment of moneys, the Buyer shall have thirty (30) days after written notice sent to it by Registered Mail at its address as hereinafter set forth, to remedy such default, and as to the payment of any moneys, ten (10) days after like notice.

V.

Manufacturing Rights

(A) Buyer is hereby given the right for a period of 8 years from and after the date hereof to manufacture additional machines of the same or substantially the same type or character as those simultaneously sold to it, conditioned, however upon:

Buyer in writing notifying Seller of its intention to immediately commence the manufacture of such machines, designating the number contemplated being built and simultaneously therewith paying the Seller Five Hundred (\$500.00) Dollars as to each machine so to be built, and immediately upon the completion of each of said machines giving the Seller written notice of the number and date of each of said machines completed, and by thereafter pay-

ing the Buyer the further sum of Forty-five Hundred (\$4500.00) Dollars as to each machine so completed, which sum shall be payable in twenty-four (24) equal monthly installments, with the first of said monthly payments to be due and payable thirty (30) days after completion of the respective machines. In the event, however, of Buyer's failure to either give Seller written notice of its intention to manufacture said machines and the number thereof, or failure to make the \$500.00 payment at the time and manner herein provided, or failing, on completion of each of said machines, to give Seller said written notice of completion thereof, the total sum of Five Thousand (\$5,000.00) Dollars as to each machine so completed shall become immediately due and payable upon the completion thereof.

(B) The Buyer did heretofore, on or about the 6th day of Dec., 1939, purchase from the Seller five (5) cup machines somewhat similar but not identical with the machines hereby purchased, and it is expressly understood and agreed that the Buyer is hereby given the right to manufacture additional machines substantially of the type and character of said five machines so heretofore sold it, conditioned, however upon:

Buyer in writing notifying Seller of its intention to immediately commence the manufacture of such machines, designating the number contemplated being built and simultaneously therewith paying the Seller Five Hundred (\$500.00) Dollars as to each machine so to be built, and immediately upon the

completion of each of said machines giving Seller written notice of the number and date of each of said machines completed, and by thereafter paying the Buyer the further sum of Two Thousand (\$2,000.00) Dollars as to each machine so completed, which sum shall be payable in twenty-four (24) equal monthly installments with the first of said monthly payments to be due and payable thirty (30) days after completion of the respective machines. In the event however, of Buyer's failure to either give Seller written notice of its intention to manufacture said machines and the number thereof, or failure to make the \$500.00 payment at the time and manner herein provided, or failing on completion of each of said machines, to give Seller said written notice of completion thereof, the total sum of Two Thousand (\$2,000.00) Dollars as to each machine so completed shall become immediately due and payable upon the completion thereof.

(C) It is expressly understood and agreed that in the event the Buyer should manufacture or use any machine, even though not substantially of the type or character, or embodying any of the principles of either the machines now or hereafter sold by it by the Seller hereunder, which makes a one piece pleated paper cup, then and in such event as to any such machines so made or used by it, within a period of five (5) years from the date hereof, it shall pay to the Seller like sums as it is obligated herein under the provisions of subsection (A) of this paragraph V to pay to the Seller, with the first \$500.00 installment thereof to become due and pay-

able upon the commencement of the use thereof. The provisions of this subsection (C) shall in no way limit the period of effectiveness of subsections (A) and (B).

VI.

Term

This agreement shall continue in full force and effect until the seller has been paid all moneys hereinbefore under the provisions of subsections (A) and (B) of paragraph II and each of the subsections of paragraph V hereof, but in no event beyond a period of twelve (12) years, provided, however, in the event of a default or breach on the part of the Buyer of any of the terms, covenants and conditions on its part to be kept and performed hereunder, then and in that event the Seller shall have the right, privilege and option of terminating this agreement upon thirty days written notice, unless such default or breach has been remedied within said thirty days, which remedy shall be in addition or cumulative to any other remedy Seller may have.

VII.

Time is of the essence of this agreement.

VIII.

Location Notices

It is expressly understood and agreed that the Buyer shall, in writing, within thirty (30) days after the delivery of each of said machines, notify the Seller the State, County, City and Street ad-

dress where each of said machines is in use, and if said machines are thereafter removed from said location the Buyer shall, likewise, within thirty (30) days thereafter give Seller like written notice, it being the intent of the parties hereto that the Seller shall at all times be fully informed as to the location of said machines in use.

IX.

Assignment

Buyer specifically agrees not to assign or attempt to assign any of its rights acquired hereunder in or to said machines, excepting in the event that said assignee, in writing, furnished Seller, agrees to be bound by, keep and perform all the terms, covenants and conditions on the Buyer's part to be kept and performed hereunder with the same force and effect as though said assignee had been designated as the original Buyer herein, and provided, further, however, that in no event shall Buyer, named herein, without Seller's written consent, be released or relieved from its obligation in the performance on the part of the Buyer of all the terms, covenants and conditions on Buyer's part to be kept and performed hereunder. Any attempted assignment contrary to the foregoing provision shall be void and of no force and effect.

X.

This agreement shall be binding on and inure to the benefit of the successors in interest or assigns

of the parties hereto, subject to the limitations hereinbefore set forth to the Buyer.

XI.

Taxes

Buyer agrees to pay any and all taxes, levies, assessments and excises that may be required from time to time by any State or the Federal Government or any of their respective political subdivisions thereof on the lease and use of said cup making machines and the manufacture, sale, vending and leasing of the paper cups manufactured.

XII.

Right of Inspection

It is expressly understood and agreed that a duly elected officer of the Seller may semi-annually at a time convenient to Seller and on its behalf, during the full term of this Agreement, enter into the plant and works of the Buyer where said machines are located for the purpose of checking and determining the number of machines for which payment should be made to the Seller hereunder which Buyer may have in operation or in its possession.

XIII.

Buyer agrees not to dispute or question the validity of United States Letters Patent which may be issued to the Seller on said cup machines or any part thereof, during the term of this agreement.

XIV.

Buyer specifically promises and agrees that it will not directly or indirectly deliver to any foreign country or exhibit or publish in any foreign country said machines thereof in whole or in part, or in any manner that may jeopardize Seller's rights to patents in such foreign countries, or permit anyone else to copy said machines.

XV.

Infringement Suits

Should any third party commence suit against Buyer, claiming that Seller's cup manufacturing machines infringe any U. S. Patent owned by them, then and in that event, the cost of defending such suit for infringement shall be borne equally by the Seller and Buyer, which action, however, shall be defended by Cromwell, Greist & Warden, or such other attorneys as the parties hereto may mutually agree upon. In the event in any such infringement action the Buyer is enjoined by a Court of competent jurisdiction from using said machines, then and in that event it is expressly understood and agreed that the due date of any payments becoming due and payable hereunder during such period as Buyer is so enjoined from using said machines, together with all payments thereafter becoming due hereunder shall be extended and no interest shall accrue on said notes for a period equal to that which Buyer is so enjoined from using said machines. This, however, shall in no way modify or change the prin-

incipal amounts to be paid, but only extend the date of payment, as hereinbefore provided, as to payments becoming due hereunder subsequent to the issuance of such injunction.

XVI.

Delivery

Delivery shall be f. o. b. common carrier Los Angeles, California, for shipment to Buyer's place of business at Chicago, Illinois, and be made at the time and in the manner hereinafter provided, but in no event until after Buyer has executed and delivered to the the Seller the 18 notes provided for in subsection (A) of paragraph II hereof.

XVII.

Acceleration

In the event of Buyer's failure to make any payments promptly at the time and in the manner provided as to any of said notes and as therein provided, and such default is not remedied within ten (10) days, after written notice served on or mailed to the Buyer, as herein otherwise provided, then and in that event the Seller, at its option, may declare due and payable forthwith any unpaid portion of the Thirty Thousand (\$30,000.00) Dollars hereinbefore in subsection (A) of paragraph II referred to which may be evidenced by promissory notes as provided for in subsection (A) of paragraph II.

XVIII.

All negotiations and representations heretofore made in connection herewith are merged herein and no oral representations are at any time to be claimed by any of the parties hereto in modification or variation of this agreement and it is understood and agreed between the parties hereto that all claims shall be invalid if asserted by either of the parties hereto.

XIX.

It is expressly understood and agreed that each and every term or provision of this agreement is several and that the invalidity of any one particular portion or paragraph shall in no way affect the remainder of this agreement.

XX.

The words "Seller" and "Buyer" herein shall be applicable to one or more parties, as the case may be and the singular include the plural and the masculine include the feminine and neuter.

XXI.

Upon Buyer notifying Seller, as hereinbefore provided, of its intention to itself manufacture any machines under the rights hereinbefore granted, then and in such event, within five days after the receipt of such notice, the Seller shall ship to the Buyer unless it has previously done so, a set of blueprints necessary to enable it to proceed with the manufacture of such machines. Seller, however, shall not be obligated to at any time furnish Buyer

with additional copies of any prints theretofore furnished it.

XXII.

In the event it is necessary to obtain a priority certificate or other authorization for the sale and purchase under and pursuant to W. P. B. Order L-83, then and in that event it is expressly understood and agreed that said machines shall not be shipped prior to such a time as such priority certificate or other authorization is received, but shall be shipped within five days after receipt thereof, and if priority certificate or other authorization is not required, then to be shipped within five days after definitely ascertaining said authorization or certificate is not required, then and in that event said \$15,000.00 paid upon the execution hereof shall be held in trust by the Buyer until such certificate or authorization above referred to shall have been obtained and the sale and delivery can be consummated without violation of any legal requirement. In the event said machines are not shipped within twenty days from and after the date hereof for any cause, then and in that event the Buyer, may, at its option, at any time thereafter, terminate and cancel this contract, and upon such termination and cancellation the \$15,000.00 so paid shall forthwith be returned to the Buyer, and in the event that said certificate or authorization is not obtained within twenty days from and after the date hereof, then and in that event the Seller may, likewise, at any time thereafter at its option terminate and cancel

this contract by returning to the Buyer said Fifteen Thousand (\$15,000.00) Dollars. In the event of the termination and cancellation of this contract by either of the parties, as hereinabove set forth, it shall become null and void and of no force and effect.

XXIII.

Notices

Any notices to be given or served by either of the parties on the other, as herein set forth, may be served in the following manner:

As to the Seller: By either personally serving it on an officer of the Corporation, or by sending by United States Mail, Registered, Postage prepaid, addressed to it at 6200 Avalon Boulevard, Los Angeles, California, or such other address as the Seller may from time to time designate.

As to the Buyer: By either personally serving it on an officer of the Corporation, or by sending by United States Mail, Registered, Postage prepaid, addressed to it at 1752 East 75th Street, Chicago, Illinois, or such other address as the Seller may from time to time designate.

In Witness Whereof, the parties hereto have caused this Agreement to be executed by their respective officers, thereunto duly authorized, and

their respective corporate seals hereunto affixed, all the day and year hereinabove first written.

PAPER CONTAINER
MANUFACTURING CO.

By LEO J. HULSEMAN,
Pres.

By
Sec'y.
Buyer.

HARCRAFT CO.

By LEO M. HARVEY,
Pres.

By HAROLD LARSON,
Sec'y.
Seller.

State of California,
County of Los Angeles—ss.

On this 12th day of June, A.D. 1942, before me, Margaret S. Evans, a Notary Public in and for said County and State, personally appeared Leo J. Hulseman, President, known to me to be the President of the Paper Container Manufacturing Co., the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my

hand and affixed my official seal the day and year in this certificate first above written.

[Seal] MARGARET S. EVANS,
Notary Public in and for
Said County and State.

State of California,
County of Los Angeles—ss.

On this 12th day of June, A.D. 1942, before me, Margaret S. Evans, a Notary Public in and for the said County and State, personally appeared Leo M. Harvey known to me to be the President, and Harold Larson, known to me to be the Secretary of the Harcraft, Inc., the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

MARGARET S. EVANS,
Notary Public in and for
Said County and State.

State of California,
County of Los Angeles—ss.

Leo M. Harvey being by me first duly sworn, deposes and says: that he is the President of Harcraft Co., a corporation, plaintiff in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; and

that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ LEO M. HARVEY.

Subscribed and sworn to before me this 24th day of June, 1949.

[Seal] LORETTA TEEGAN,
Notary Public in and for Said County and State of
California.

My commission expires Oct. 1, 1951.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 14, 1950.

In the United States District Court for the
Southern District of California, Central Division
No. 11432-Y

HARCRAFT CO., a Corporation,

Plaintiff,

vs.

PAPER CONTAINER MANUFACTURING CO.,
a Corporation,

Defendant.

NOTICE OF FILING OF PETITION FOR
REMOVAL AND BOND UPON REMOVAL

To the Above-Named Plaintiff and to Harold
Larson, Its Attorney:

You will please take notice that on the 14th day of April, 1950, the defendant herein, Paper Container Manufacturing Co., a corporation, filed in the Office of the Clerk of the United States District Court for the Southern District of California, Central Division, a Petition for Removal and a Bond Upon Removal, copies of which said Petition and Bond are served upon you concurrently herewith; and thereafter, on April 14, 1950, this defendant further filed a copy of said Petition for Removal with the Clerk of the Superior Court of the State of California in and for the County of Los Angeles.

Said Petition for Removal was made upon the grounds that said cause is one over which the United States District Court has original jurisdiction; that the amount in controversy is in excess of the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs; and that the controversy is one existing only between citizens of different states, to wit, between the plaintiff herein, a citizen and resident of the County of Los Angeles, State of California, and this defendant herein, a corporation organized and existing under and by virtue of the laws of the State of Illinois and a citizen and resident of the State of Illinois.

HENRY F. PRINCE,

FREDERIC H. STURDY,

By /s/ FREDERIC H. STURDY,
Attorneys for Defendant, Paper Container Manufacturing Co.

GIBSON, DUNN & CRUTCHER.

By /s/ FREDERIC H. STURDY,
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 14, 1950.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Paper Container Manufacturing Co., a corporation, the defendant in the above-entitled action, does hereby substitute Messrs. Sheppard, Mullin, Richter & Balthis, 458 South Spring Street, Los Angeles 13, California, as its attorneys in said action, in the place and stead of Messrs. Gibson, Dunn & Crutcher.

Dated: May 24th, 1950.

PAPER CONTAINER
MANUFACTURING CO.

By /s/ ROBERT McHUGH,
Secretary.

The undersigned hereby consents to the foregoing Substitution of Attorneys.

Dated: May 29, 1950.

GIBSON, DUNN & CRUTCHER.

By /s/ FREDERIC H. STURDY.

The undersigned hereby accept the foregoing Substitution of Attorneys.

Dated: May 31, 1950.

SHEPPARD, MULLIN,
RICHTER & BALTHIS, and
/s/ CAMERON W. CECIL.

[Endorsed]: Filed June 2, 1950.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Harold Larson, Esq. and Messrs. Fleming, Robins & Tinsman are hereby substituted as attorneys for plaintiff in the above-entitled proceeding in the place and stead of Harold Larson.

Dated this 31st day of May, 1950.

HARCRAFT CO.,
A Corporation.

By /s/ HAROLD LARSON,
Secretary.

I hereby consent to the foregoing Substitution.

Dated this 31st day of May, 1950.

/s/ HAROLD LARSON.

We hereby accept the foregoing Substitution.

Dated this 31st day of May, 1950.

HAROLD LARSON and
FLEMING, ROBBINS &
TINSMAN,

By /s/ CLAY ROBBINS.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 2, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS AND MOTION FOR
MORE DEFINITE STATEMENT

To the Plaintiff Above Named and to Messrs.
Fleming, Robbins & Tinsman, 210 West Seventh
Street, Los Angeles 14, California, Its At-
torneys, and to Whomsoever It May Concern:

You and Each of You Will Please Take Notice
that the defendant will on Monday, July 17, 1950, at
10:00 a.m. of said day, or as soon thereafter as
counsel may be heard, in the courtroom of the Hon-
orable Leon R. Yankwich, Judge of the above-named
Court, in the Federal Building, Los Angeles, Cali-
fornia, move the above-named Court as follows:

I.

Motion to Dismiss

Said defendant moves the Court for an order dis-
missing the complaint in the above-entitled matter
upon the ground that the complaint fails to state a
claim upon which relief can be granted for the

reason that the alleged contract sued upon is illegal as being in violation of the Clayton Act (15 U.S.C.A. § 14).

II.

Motion for More Definite Statement

Said defendant moves for a more definite statement in the following particulars:

(a) As to whether the complaint is "for money" as set forth in the title, or for an alleged breach of a conditional sales agreement as alleged in Paragraph III of the complaint.

(b) As to whether said alleged conditional sales agreement was written or oral.

(c) As to whether any of the notices required by said alleged conditional sales agreement have been given by the plaintiff to the defendant.

Said motions are made upon the foregoing notice of motion, upon the points and authorities attached hereto, and upon all papers and records on file in the above-entitled action at the time said motions are heard. The defendant requests permission to argue orally the foregoing motions.

Dated: June 27, 1950.

SHEPPARD, MULLIN,
RICHTER & BALTHIS,

JAMES C. SHEPPARD and

/s/ CAMERON W. CECIL,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 28, 1950.

At a stated term, to wit: The February Term A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 24th day of July in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

ORDER

For hearing motion of defendant, filed June 28, 1950, (1) to dismiss, and (2) for more definite statement; C. S. Tinsman, Esq., appearing as counsel for plaintiff; C. W. Cecil, Esq., appearing as counsel for defendant;

Court orders cause continued to 2 p.m.

At 2 p.m. court reconvenes herein and all being present as before, including counsel for both sides; Attorney Tinsman argues to the Court.

Court orders motion to dismiss granted, and motion for more definite statement is denied; defendant to prepare formal order.

In the District Court of the United States, Southern
District of California, Central Division

No. 11432-Y

HARCRAFT CO., a Corporation,

Plaintiff,

vs.

PAPER CONTAINER MANUFACTURING CO.,
a Corporation,

Defendant.

JUDGMENT OF DISMISSAL

The defendant's Motion to Dismiss and Motion for More Definite Statement in the above-entitled action, having come on regularly for hearing before the Honorable Leon R. Yankwich, Judge of the above-named Court, in the United States Post Office and Courthouse Building at Los Angeles, California, on July 24, 1950, and the plaintiff having then appeared by Harold Larson, Esquire, and Messrs. Fleming, Robbins & Tinsman and Clifford S. Tinsman, Esquire, its attorneys, and the defendant having then appeared by Cameron W. Cecil, Esquire, of Messrs. Sheppard, Mullin, Richter & Balthis, its attorneys, and said motions having been argued,

Now, Therefore, It Is Ordered, Adjudged and Decreed that the Motion to Dismiss is granted, and the cause be, and the same hereby is dismissed, and

It Is Further Ordered, Adjudged and Decreed that the Motion for More Definite Statement be, and the same hereby is denied.

Dated: July 26, 1950.

/s/ LEON R. YANKWICH,
Judge.

Approved as to form as required by Rule 7(a):

HAROLD LARSON and
FLEMING, ROBBINS &
TINSMAN,

By /s/ CLIFFORD S. TINSMAN,
Attorneys for Plaintiff.

Received copy of the within Judgment of Dismissal, July 25, 1950.

HAROLD LARSON and
FLEMING, ROBBINS &
TINSMAN,

By /s/ CLIFFORD S. TINSMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed July 26, 1950.

Judgment entered July 27, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that Harcraft Co., a Corporation, plaintiff above named, hereby appeals to the United States Court of Appeals, for the 9th Circuit, from that portion of the Judgment of Dis-

missal granting motion of defendant Paper Container Manufacturing Co. to dismiss the above-entitled action and dismissing the same, which judgment was entered in this action on the 27th day of July, 1950, in Book 67, Page 274 of Judgments.

Dated: August 24, 1950.

HAROLD LARSON and
FLEMING, ROBBINS &
TINSMAN,

By /s/ CLAY ROBBINS,
Attorneys for Appellant,
Harcraft Co., a Corp.

[Endorsed]: Filed August 25, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above-Entitled Court:

Appellant, Harcraft Co., a Corporation, hereby designates the following portions of the record in the above-entitled proceeding to be contained in the record on appeal:

1. Summons and Complaint.

2. Order Granting Petition for Removal of Action From the Superior Court of the State of California, in and for the County of Los Angeles, to

United States District Court for the Southern District of California, Central Division.

3. Substitution of Attorneys by plaintiff, dated the 31st day of May, 1950.

4. Substitution of Attorneys by defendant Paper Container Manufacturing Co., dated May 24, 1950.

5. Motion to Dismiss, Motion for More Definite Statement and Memorandum of Points and Authorities in Support Thereof, filed by defendant Paper Container Manufacturing Co., dated June 27, 1950.

6. Plaintiff's Points and Authorities in Opposition to Motion to Dismiss and re Motion for More Definite Statement, dated July 18, 1950.

7. Judgment of Dismissal entered July 27, 1950, in Book 67, Page 274 of Judgments; and

8. Notice of Appeal dated August 24, 1950, filed by plaintiff on August 25, 1950.

Dated: September 1, 1950.

HAROLD LARSON and
FLEMING, ROBBINS &
TINSMAN,

By /s/ CLAY ROBBINS,
Attorneys for Appellant.

[Endorsed]: Filed September 2, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 56, inclusive, contain the original Petition for Removal with Summons and Complaint attached; Notice of Filing of Petition for Removal and Bond on Removal; Substitutions of Attorneys for Plaintiff and Defendant; Motion to Dismiss, Motion for More Definite Statement and Memorandum of Points and Authorities in Support Thereof; Plaintiff's Authorities in Opposition to Motion to Dismiss and re Motion for More Definite Statement; Judgment of Dismissal; Notice of Appeal and Designation of Record on Appeal and a full, true and correct copy of Minute Order entered July 24, 1950, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 26th day of September, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12697. United States Court of Appeals for the Ninth Circuit. Harcraft Co., a Corporation, Appellant, vs. Paper Container Manufacturing Co., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 27, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12697

HARCRAFT CO., a Corporation,

Appellant,

vs.

PAPER CONTAINER MANUFACTURING CO.,
a Corporation,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY UPON
APPEAL

Comes now the Appellant, Harcraft Co., a Corporation, plaintiff, and files this its statement of points on which it intends to rely on appeal, as follows:

1. That the Court erred in dismissing plaintiff's complaint, on the grounds, that

(a) Said complaint states a claim upon which relief can be granted against the appellee.

(b) To invalidate a contract under the provisions of the Clayton Act (15 U.S.C.A. Sec. 14) there must be proof that the effect of the contract or its understanding is that it may substantially lessen competition or create a monopoly. Such contract is not illegal per se.

(c) The complaint seeks to recover delinquent installments due under a purchase contract for machinery. Section C of Paragraph V of the contract is no part of the consideration for the sale of the machinery; has no relation to the obligation for the purchase price. A party will not be allowed to escape just legal undertakings under such circumstances.

Respectfully submitted,

HAROLD LARSON and
FLEMING, ROBBINS &
TINSMAN,

By /s/ C. S. TINSMAN,
Attorneys for Appellant.

Receipt of Copy acknowledged.

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Nos. 12,698-99

IN THE

United States

Court of Appeals

For the Ninth Circuit

BANK OF CHINA, a Corporation, *Appellant,*
vs.

WELLS FARGO BANK & UNION TRUST Co., a
Banking Corporation, *Appellee.*

No. 12698

BANK OF CHINA, a Corporation, *Appellant,*
vs.

WELLS FARGO BANK & UNION TRUST Co., a
Banking Corporation, *Appellee.*

No. 12699

Appellant's Opening Brief

A. CRAWFORD GREENE
MORRIS M. DOYLE
OWEN JAMESON
1500 Balfour Building
San Francisco 4, California

JAMES B. BURKE
72 Wall Street
New York 5, New York

*Attorneys for Appellant
Bank of China.*

MCCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
1500 Balfour Building
San Francisco 4, California

BURKE & BURKE
72 Wall Street
New York 5, New York
Of Counsel.

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PAUL P. O'BRIEN

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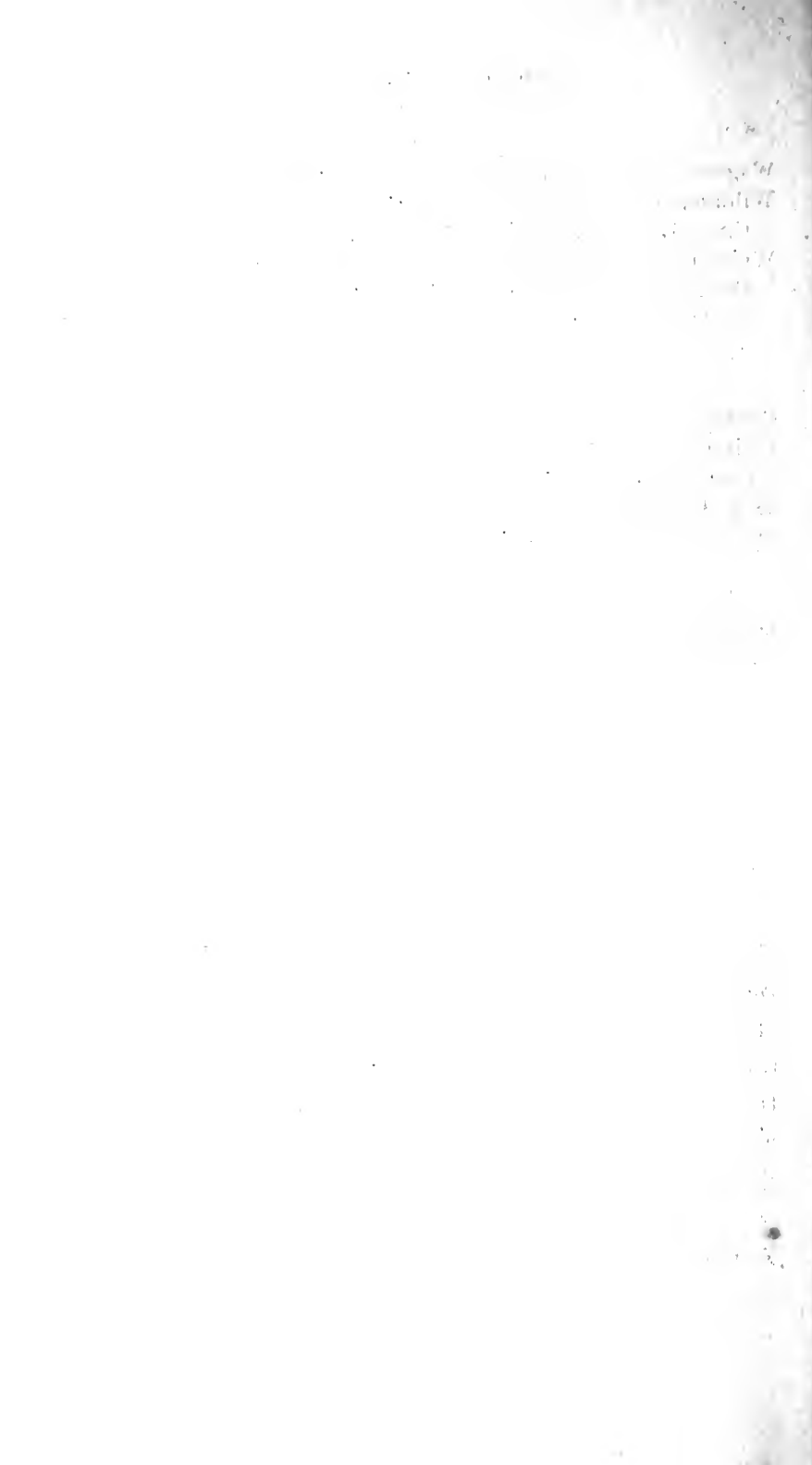
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No. 12698

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WELLS FARGO BANK & UNION TRUST Co., a Banking Corporation,	<i>Appellee.</i>
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No. 12699

Appellant's Opening Brief

INTRODUCTION

These are appeals from two similar decisions of the District Court in companion cases denying a depositor access to its demand deposits in the defendant bank and discharging that bank from all liability to its depositor. The Bank of China, appellant, is the international exchange bank of the National Government of the Republic of China, the government of China recognized by the United States. It deposited more than \$800,000.00 with appellee, Wells Fargo Bank & Union Trust Co. Appellant, driven from the mainland of China by the Communist armies and now conducting its banking operations from its head office in Formosa, demanded return of its funds. The appellee bank refused to pay because representatives of the Com-

munist Peoples Government of China, relying upon their seizure of the assets of the Bank of China on the China mainland, claimed that they had become the legal representatives of the Bank of China. Attorneys for the Communists appeared in the court below and moved to dismiss these actions on the ground that the appellant Bank of China, operating from Formosa, was not entitled to maintain them.

The District Court denied the motions to dismiss. It also denied appellant's motion for summary judgment. More than that, it directed that the funds of appellant be deposited with the Clerk of Court to remain there indefinitely; it ordered that the appellee bank be finally discharged of all liability to appellant both for principal and interest; and it enjoined appellant from attempting to enforce in any fashion its rights against appellee. The District Court held in effect that, since the Bank of China had lost certain of its assets in China by seizure and conquest, it was also to be deprived of its San Francisco assets. The decision is contrary to the public policy of the United States and it is in conflict with the settled rule that acts of seizure or expropriation by an unrecognized foreign government create no claim to assets located in the United States.

JURISDICTION

The jurisdiction of the District Court was based upon diversity of citizenship (28 U.S.C. 1332). Plaintiff-appellant, Bank of China, is a corporation organized under the laws of the National Government of the Republic of China. Defendant-appellee, Wells Fargo Bank & Union Trust Co., is a California corporation (R. No. 12698, p. 3; No.

12699, p. 3). There are no other parties. The amount in controversy in each case exceeds \$3,000 exclusive of interest and costs (R. No. 12698, pp. 4, 6; No. 12699, pp. 4, 15).

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. 1291, 1292 and 1294(1). The orders of the court below, amounting to final decisions and injunctions in both cases, were entered August 7, 1950 (R. No. 12698, p. 106; No. 12699, p. 26). Notices of appeal were filed August 28, 1950 (R. No. 12698, p. 111; No. 12699, p. 31). Motions to dismiss the appeals were denied by this Court on October 17, 1950.

By stipulation the decision of the District Court in case No. 12699 was made upon the record and decision in case No. 12698. By order of this Court the cases are consolidated for briefing and argument.

STATEMENT OF THE CASE

The Bank of China, created in 1912 (R. 187, 303)¹, was reorganized in 1928 under special charter of the National Government of the Republic of China as an international exchange bank (R. 187, 303). Under the new charter and subsequent to 1935 the National Government held half of the stock of the bank (R. 164, 303), and named nine of its twenty-one directors (R. 307). During the war with Japan, the National Government made further capital contributions to the bank (R. 287) and by decree so revised its status that the Government held two-thirds of the stock (R. 90, 287-8) and named thirteen of twenty-five directors (R. 90, 287-8). The balance of the stock was privately held

¹Unless otherwise noted, all references are to the record in No. 12698.

and the remaining directors were named by the private stockholders (R. 287-8, 90, 169). Under its charter the Bank has both public and private functions. The Bank is responsible for handling National Government funds deposited abroad (R. 305), for issuing National Government bonds in foreign markets (R. 305), for promotion of trade (R. 305), for handling a portion of the Treasury funds of the National Government (R. 305), and for certain commercial functions (R. 306).

The present directors of the Bank were elected at a stockholders meeting in 1948 (R. 92, 169-70) for a term of four years (R. 307). Twenty-one of the twenty-five directors are in Formosa, Hong Kong or the United States (R. 183). Two of the twenty-five are residing in areas subject to Communist control (R. 183). The whereabouts of the other two are unknown (R. 183). The managing directors of the bank, a group of seven (including the Chairman of the Board) selected from the board of twenty-five (R. 307), are all in Formosa, Hong Kong or New York (R. 183). These constitute the executive committee which operates the Bank (R. 234). The general manager of the Bank, Mr. Hsi Te-Mou, certified as such by the National Government (R. 300), who is now in New York and actively engaged in conducting the affairs of the Bank (R. 283), and the manager of the New York agency, Mr. Tuh-Yueh Lee, who possesses broad powers over the Bank's affairs in this country (R. 37, 230-1, 241), authorized the institution of these actions (R. 263-4).

Prior to the Communist conquest the Bank had its head office in Shanghai (R. 304) with numerous Chinese and foreign branches (R. 273, 304) including a New York agency (R. 245, 265) operating under the supervision of

the New York State Banking Department (R. 265, 301-2). The advance of the Communist armies forced the Bank to transfer its headquarters from Shanghai. The Bank directors in cooperation with the National Government which held two-thirds of the stock of the Bank and hence had full power to direct its destiny (R. 194, 287-8) moved the Bank in advance of the Communist forces from Shanghai to Canton (R. 195, 298), from Canton to Chungking (R. 36, 298) and finally from Chungking to Formosa (R. 298). From headquarters there the Bank continues to conduct its affairs as a corporation certified to be in good standing by the National Government (R. 298). After the Bank left Shanghai, new ciphers, test keys and signatures were authorized (R. 225-6, 247-9) and correspondents of the Bank, including Wells Fargo were notified accordingly (R. 247-9, 255, 271-2).

In June, 1949, the Bank of China had been doing business with Wells Fargo for many years (R. 131, 115, 149). The Bank then had on deposit with Wells Fargo in San Francisco more than \$800,000. The accounts bore various branch bank designations, "Bank of China, Shanghai," "Bank of China, Hong Kong," "Bank of China, New York," "Bank of China, Tientsin," and "Bank of China, Tsingtao" (R. 7; R. No. 12699, p. 15), but the funds belonged in each case to the single corporate entity "Bank of China" (R. 57-8, 90, 192, 273). On June 27, 1949, Wells Fargo received a cable from Communist Shanghai reading:

"Following the liberation of Shanghai this bank was taken over by the Shanghai Military Control Commission by order of the Chinese Peoples Liberation Army East China Command on May Twenty-eighth and the powers vested in its original board of

directors are now temporarily vested in the East China Financial and Economic Affairs Administration Stop Those officers who escaped to Hong Kong and elsewhere have been dismissed and can no longer represent this bank Stop Their specimen signatures and testkey established between you and them should be considered null and void Stop All communications from them are unauthorized Stop You are requested not to make payment except by our specific order" (R. 134).

A similar cable was received June 30, 1949 (R. 68, 138), and on July 22, 1949, the Communists purported to notify Wells Fargo by cable that "by order of Chinese Peoples Liberation Army East China Command" a new general manager and assistant general manager had been appointed for the "Bank of China" (R. 68, 140).

On October 7, 1949, Wells Fargo received instructions from the head office, foreign department, of the Bank of China then located in Hong Kong to transfer \$600,000 to the New York agency of the Bank (R. 261). Wells Fargo refused to make the transfer, setting up the possible conflicting Communist claim (R. 261). Thereafter, payment of the entire deposit which had been made from its Shanghai office and then amounting to \$626,860.07 was demanded by the Bank of China and refused by Wells Fargo (R. 4, 6). Appellant later demanded payment of additional deposits originating from its Hong Kong, New York, Tientsin, and Tsingtao offices and totaling \$174,224.57,² which was likewise refused (R. No. 12699, pp. 4,

²This debt was later reduced to \$171,724.57 through payment (allegedly by inadvertence) of a draft for \$2,500.00, drawn against Wells Fargo by appellant (R. No. 12699, pp. 15, 24).

15-16). The refusal of Wells Fargo to pay was caused by the Communist claims (R. 116-17, 144, 150, 330-1).

These actions were filed by the Bank of China to enforce its demands and recover its funds. Appellant moved for summary judgment (R. 11). The ruling on the motion was reserved and the action was set for immediate trial (R. 335). Thereupon, Robert W. Kenny, Esq., Martin Popper, Esq., Benjamin Dreyfus, Esq., and Francis J. McTernan, Jr., Esq., acting at the instance of Frederick Vanderbilt Field and purporting to represent the Bank of China and relying upon cable instructions received by them from Communist representatives in Peking (R. 80, 89-94), filed a motion in case No. 12698 to dismiss the complaint or, in the alternative, to substitute themselves as attorneys for the plaintiff (R. 75). The motion was heard January 30, 1950. On August 7, 1950, the court below entered the order from which this appeal was taken (R. 106). By that order (R. 106):

(1) Appellant, Bank of China, was finally denied access to its demand deposit in the hands of Wells Fargo;

(2) Wells Fargo was authorized to deposit with the Clerk of the District Court an amount equal to appellant's deposit with Wells Fargo;

(3) Wells Fargo was finally discharged from all liability to appellant;

(4) Wells Fargo was finally relieved of any obligation to pay interest to appellant;

(5) Appellant was enjoined from asserting any claim against Wells Fargo;

(6) The trial of the action was continued sine die;

(7) Appellant's motion for summary judgment was denied without prejudice;

(8) The motion of Messrs. Kenny, Popper, Dreyfus and McTernan for dismissal of the action or for substitution of attorneys was denied without prejudice.

Similar motions were made in case No. 12699 (R. No. 12699, p. 5) and a similar order entered (R. No. 12699, p. 26). Subsequently, Wells Fargo, pursuant to the order of the District Court, transferred to the Clerk of that Court an amount equal to the deposits (R. 393; R. No. 12699, p. 34).

Notices of appeal from the orders of the District Court were filed August 28, 1950 (R. 111; R. No. 12699, p. 31).

SPECIFICATION OF ERRORS RELIED UPON

A detailed statement of points upon which appellant relies in each case is in the record (R. 397; R. No. 12699, p. 35). They may be summarized as follows:

1. The court erred in failing to enter judgment for Bank of China against Wells Fargo in the amount of its deposits plus interest, in purporting finally to discharge Wells Fargo from all liability to Bank of China, including liability for interest, and in enjoining Bank of China from prosecuting its claims against Wells Fargo.

2. The court erred in failing to grant the motion of Bank of China for summary judgment and in failing to deny the motion of Messrs. Popper and Kenny with prejudice.

3. The court erred in authorizing a deposit of funds by Wells Fargo with the Clerk of Court and in postponing a determination of the disposition of those funds sine die.

SUMMARY OF THE ARGUMENT

Appellant, Bank of China, deposited its funds in San Francisco with Wells Fargo in accordance with a course of dealing extending over many years. The Bank, its officers and most of its directors, in advance of the Communist armies, moved from Shanghai to Canton to Chungking and finally to Formosa, where the Bank continues to operate. The Bank has demanded that Wells Fargo pay what is owing. Wells Fargo has refused to do so.

The Communist armies of China have conquered and subdued, to a greater or lesser degree, most of the mainland of China. The Communists appear to have seized many of the assets in China of the Bank of China and appear to have undertaken to operate those assets for banking purposes under the name of the Bank of China. Nothing, however, which has or can happen in China can affect the right of appellant to its San Francisco assets. It is settled beyond argument that a revolutionary regime, even though it may be a *de facto* government, which is unrecognized by this country cannot by any act of expropriation or seizure of a corporation or its assets obtain any claim to the assets of that corporation which are located in this country, including bank deposits. There is no dissenting view.

The Bank of China exists pursuant to a special charter of the National Government of China. Two-thirds of its stock is held by the Government of China. The Communists by claiming to be the "Government of China" acquire no claim to the bank stock. The "Government of China" to which the articles refer is by the terms of the articles themselves the National Government of China. That government became and remains the principal stock-

holder of the Bank. Moreover, the question of the identity of the government of China is a political question to be decided by the President on the advice of the Secretary of State. The President recognizes the National Government as the government of China. That decision is binding on this Court. The Communists cannot be heard here to assert claims based upon a contention that their government is the government of China.

The action of the District Court in sequestering funds of appellant at the behest of the Communists is contrary to the public policy of the United States and the policy of the Federal courts. The armies of Communist China have undertaken an armed conflict against the armies of the United Nations, including the armies of the United States. The policy of this Court is and must be to support the policy of the United States—not to withhold appellant's funds at the request of the Communists who have no standing in court and no claim to the funds.

Appellant is entitled to an order from this Court directing Wells Fargo to honor its obligation to appellant and to pay to appellant the principal amount of its deposits, plus interest from the date of demand.

ARGUMENT

A. Appellant Is Entitled to Judgment Against Wells Fargo for \$798,584.64 Plus Interest.

Appellant Bank of China, specially chartered by the National Government of China and now conducting a banking business from Formosa, deposited its funds with appellee Wells Fargo (R. 4, 6; R. No. 12699, pp. 4, 15-16). The deposits were demand deposits (R. 4-6; No. 12699, pp. 4, 15-16). Demands were made for return of the funds.

These demands were not honored (R. 4-6; R. No. 12699, pp. 4, 15-16). The failure of Wells Fargo to honor the demands immediately vested a cause of action in appellant as depositor. *Allen v. Bank of America*, 58 Cal. App. 2d 124, 136 P.2d 345 (1943); *Union Tool Co. v. Farmers and M. Nat. Bank*, 192 Cal. 40, 53, 218 Pac. 424 (1923). A depositor is entitled to a judgment for the amount of his deposit plus interest from the date of demand until the date of judgment. "As an incident to the right to recover an unexpended balance in a deposit, a depositor is entitled to interest as damages for the failure to pay that balance upon demand." *Ticonic Bank v. Sprague*, 303 U.S. 406, 410, 58 S.Ct. 612, 614 (1938). "If the money is due on demand, interest is allowable from the time of demand." 14 Cal. Jur. 678; California Civil Code, Sec. 3302; *Ghirardelli v. Peninsula Properties Co.*, 16 Cal.2d 494, 499, 107 P.2d 41, 44 (1940); *Anderson v. Pacific Bank*, 112 Cal. 598, 603, 44 Pac. 1063, 1064 (1896); *Commercial Discount Co. v. Bank of America*, 61 C.A.2d 721, 726, 143 P.2d 484, 487 (1943); *Black v. Vermont Marble Co.*, 137 Cal. 683, 70 Pac. 776 (1902); cf. *Sokoloff v. National City Bank*, 250 N.Y. 69, 164 N.E. 745, 750 (1928). In the absence of a prior demand, interest begins to run upon institution of an action to recover the deposit. *Burks v. Weast*, 67 Cal. App. 745, 752, 228 Pac. 541, 544 (1924). The rate at which interest is to be allowed is the legal rate of 7 per cent per annum. 2 Deering's California General Laws 1350, Act 3757, Sec. 1; *Bank of the United States v. Foreman*, 102 Cal. App. 756, 766, 283 Pac. 874, 878 (1929). Appellant made demand on Wells Fargo for \$600,000.00 on October 7, 1949 (R. 261), for \$26,860.07 on November 9, 1949 (R. 4-5), and for the balance of \$171,724.57 upon the institution of case No. 12699 on April

26, 1950 (R. 12699, pp. 4-5). Appellant is entitled to interest accordingly.

The fact that unfounded claims were asserted to the deposits does not justify Wells Fargo's refusal to pay or free it from its obligation to pay interest. *Lewine v. National City Bank*, 222 App. Div. 74, 225 N.Y.S. 309 (1927), aff'd. 162 N.E. 284 (1928), 164 N.E. 571 (1928); cf. *Commercial Discount Co. v. Bank of America*, 61 C.A.2d 721, 726, 143 P.2d 484, 487 (1943). The duty of the bank "is to pay the money to its depositor." *Wagner v. Worrell*, 76 C.A.2d 172, 180, 172 P.2d 751, 756 (1946). See also *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 27, 54 Pac. 370, 372 (1898); *Ornbaun v. First Nat. Bank*, 215 Cal. 72, 78, 8 P.2d 470, 473 (1932). Wells Fargo had, in fact, no reason for uncertainty. The National Government of China is the recognized government of China and "The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 140, 58 S.Ct. 785, 792 (1938). Nor would a subsequent recognition of the Communists, even if it took place, in any way affect the validity of the prior payment to appellant. See *Guaranty Trust Co. v. United States*, 304 U.S. 126, 140, 58 S.Ct. 785, 792-3 (1938); *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 444 (C.C.A.2d 1940); *United States v. National City Bank of New York*, 90 F. Supp. 448, 453-455 (S.D. N.Y., 1950).³

³Compare California Banking Code, sec. 952, which provides that a bank may disregard an adverse claim to a deposit unless that claim is supported by a court order. See in this connection *National City Bank v. Continental Nat. Bank*, 83 F.2d 134 (C.C.A. 10, 1936).

Appellant is entitled to judgment for its deposits with interest.

B. The Communists Have No Claim to the San Francisco Bank Deposits of Appellant.

Nothing which the Communists have done or can do in China has or will vest any claim in them or their representatives to the San Francisco bank deposits of appellant. This is true even if it be assumed that the Communists have de facto control of the China mainland, that they have established a de facto government there and that they have seized all the mainland assets of the Bank of China. It would be equally true even if, in addition, the Communists had purported to pass decrees nationalizing or expropriating the Bank of China, its corporate existence and all its assets wherever located. There are at least three reasons.

1. THE BANK OF CHINA, THE OWNER OF THE WELLS FARGO DEPOSITS, IS IN FULL OPERATION AND ENTITLED TO THE RETURN OF ITS FUNDS.

Appellant, the organization which was specially chartered by the National Government (R. 303) and which owns the funds on deposit with Wells Fargo, is still in full operation. In advance of the Communist armies and at the behest of the government (R. 194-5) which owns two-thirds of its stock (R. 90, 287-8) and under whose law it exists, the Bank, its officers and directors, left the mainland of China to establish headquarters in Formosa (R. 194-5, 298). From this site appellant continues its banking operation (R. 298, 282-3). The fact that the Communists may have seized the bank buildings, bank equipment and the physical assets of the Bank on the mainland of China can hardly mean that appellant has lost its rights to its San Francisco assets as well. The Bank which deposited funds

with Wells Fargo is the Bank which now claims them. That Bank has lost some of its assets by force of arms as it might lose some of its assets by fire or flood. Nothing else has happened. The Bank continues to operate under the authority of the government responsible for its existence. That government has held and continues to hold two-thirds of the bank stock. The Bank is a vigorous existing institution with full right to the return of the moneys it left with Wells Fargo.

2. AN UNRECOGNIZED FOREIGN GOVERNMENT CANNOT ACQUIRE A CLAIM TO ASSETS IN THE UNITED STATES.

Even if appellant were not actively in business, even if the Communists held not only all the Chinese assets of the Bank but, in addition, had by decree or otherwise, purported to seize the corporation itself and all of its assets wherever located, appellant would still be entitled to its San Francisco bank account. It is settled that an unrecognized foreign government cannot acquire directly or indirectly, in its own name or in the name of others, an interest in or claim to assets in the United States. There is no contrary view.⁴

⁴The District Court suggested that the "decisions present a confusing picture" (R. 101). There is no confusion in the decisions, however, as far as the precise situation before the Court is concerned. The confusion, if any exists, arises in connection with other questions such as: (1) The effect to be given by United States courts to transactions involving persons or property physically subject to the de facto control of the unrecognized government and later appearing in this country. See *Texas v. White*, 7 Wall. (74 U.S.) 700, 733, 19 L.Ed. 227, 240 (1868); *Baldy v. Hunter*, 171 U.S. 388, 396, 18 S.Ct. 890, 892 (1898); *Banque de France v. Equitable Trust Co.*, 33 F.2d 202 (S.D. N.Y. 1929); *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83 (1897). (2) The effect of non-recognition upon claims asserted against the United

The Communist conquest of Russia settled the law. The Russian Communists like the Chinese Communists, seized the local assets of Russian corporations and, like the Chinese Communists, claimed assets located in the United States as well. Those claims were denied. The leading case is *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank of New York*, 253 N.Y. 23, 170 N.E. 479 (1930), cert. den. 282 U.S. 878. There plaintiff, a Russian bank chartered by the Imperial Government, had deposit accounts with the National City Bank in New York. In 1917 the Communists seized the Russian assets of plaintiff, drove its directors into exile in Paris, purported to confiscate all assets of plaintiff wherever located and, later, to abolish the plaintiff bank entirely. Thereafter the Russian directors in Paris undertook to collect the assets of plaintiff located there, in London and in New York. The National City Bank refused to honor the demands of the Paris directors on the ground, among others, that the Communists had not only seized the bank and its assets but had, indeed, terminated its existence. The New York Court of Appeals, noting that the acts of the Communists had no legal effect, directed judgment for plaintiff. Chief Judge Cardozo said:

“The case comes down to this: A fund is in this state with title vested in the plaintiff at the time of the

States. See *Russian Volunteer Fleet v. U. S.*, 282 U.S. 481, 51 S.Ct. 229 (1931). (3) The sovereign immunity, if any, of the unrecognized government. See *Wulfsohn v. Russian Soc. Fed. Sov. Republic*, 234 N.Y. 372, 138 N.E. 24 (1923), writ of error dismissed, 266 U.S. 580, 45 S.Ct. 89 (1924). But on the question before this Court—can the unrecognized government of China, directly or indirectly, in its own name or in the name of others, acquire a claim to appellant’s San Francisco assets—there is no doubt or uncertainty whatever. The answer is no.

deposit. Nothing to divest that title has ever happened here or elsewhere. The directors who made the deposit in the name of the corporation or continued it in that name now ask to get it back. Either it must be paid to the depositor, acting by them, or it must be kept here indefinitely. Either they must control the custody, or for the present and the indefinite future it is not controllable by any one. The defendant expresses the fear that the money may be misapplied if the custody is changed. The fear has its basis in nothing more than mere suspicion. The directors, men of honor presumably, will be charged with the duties of trustees, and will be subject to prosecution, civil or criminal, if those duties are ignored. The defendant is not required to follow the money into their hands and see how they apply it. Its duty is to pay." p. 486.

The *Petrogradsky* decision has been accepted without hesitation or dissent. See, for example, *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456 (1934) and *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933), where the court said:

"We have considered the extraterritorial effect of Soviet decrees which liquidated Russian banks (*Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 N.Y. 23, 170 N.E. 479) and insurance companies (*First Russian Ins. Co. v. Beha*, 240 N.Y. 601, 148 N.E. 722). *We have reached the conclusion* in those and similar cases that such decrees had no extraterritorial effect and *that the continued existence of such companies, wherever they were found to function outside of Russia, would be recognized.*" p. 681. (Emphasis supplied)

The rule denying an unrecognized government power over assets in this country has been followed in the cases arising out of the German conquest of Europe during World War II. In *Koninklijke Lederfabriek "O" v. Chase Nat. Bank*, 177 Misc. 186, 30 N.Y.S.2d 518 (1941) aff'd 32 N.Y.S.2d 131, the plaintiff corporation had money on deposit in New York with the Chase National Bank. The corporation and some of its officers made their way out of the Netherlands ahead of the Germans. In exile they brought suit for the deposit. The Germans, in the meantime, had taken charge of the Dutch assets of the corporation, declared that the old officers were no longer authorized to represent it and claimed the New York deposit. Judgment went for plaintiff. *Amestelbank, N. V. v. Guaranty Trust Co.*, 177 Misc. 538, 31 N.Y.S.2d 194 (1941), reached the same conclusion on substantially identical facts. More recently in *A/S Merilaid & Co. v. Chase Nat. Bank of City of New York*, 189 Misc. 285, 71 N.Y.S.2d 377 (1947), the defendant bank held a deposit of a corporation organized under the laws of the Republic of Estonia. The corporation, just prior to the incorporation of Estonia into the Soviet Union in 1940, transferred its activities to Sweden and thereafter sought to collect its New York bank account. The corporation, in the meantime, had been nationalized by the Estonian Soviet Socialist Republic, and its Estonian assets seized. It was held that a defense based upon the activities of the Soviet Government was invalid.⁵

⁵For additional New York decisions generally to the same effect see *Fred S. James & Co. v. Rossia Insurance Co.*, 247 N.Y. 262, 160 N.E. 364 (1928); *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924).

The early New York decision in *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 147 N.E. 703 (1925), reargument denied, 148

The Federal courts have reached an identical conclusion. The leading case is *The Maret*, 145 F.2d 431 (C.C.A. 3, 1944). It too arose out of the 1940 Communist seizure of Estonia. The Soviet Government promulgated decrees purporting to nationalize privately-owned ships of Estonian registry and to place them under control of the Estonian State Steamship Line. *The Maret*, which belonged to an Estonian partnership, was in the Virgin Islands at the time of the Soviet action. It was held that the decrees of the unrecognized Estonian government could not affect ownership of the vessel physically beyond the jurisdiction of the de facto government. The court said:

“When the fact of nonrecognition of a foreign sovereign and nonrecognition of its decrees by our Executive is demonstrated as in the case at bar, the courts of this country may not examine the effect of decrees of the unrecognized foreign sovereign and determine rights in property, subject to the jurisdiction of the examining court, upon the basis of those decrees. A policy of nonrecognition when demonstrated by the Executive must be deemed to be as affirmative and positive in effect as a policy of recognition.” p. 442.⁶

N.E. 757, is not to the contrary. There the New York court refused as a matter of policy to take jurisdiction of a case brought by a Russian insurance company against the New York Superintendent of Insurance to recover deposits required by New York law to protect New York citizens. The case has no application here and in any event it was prior to and superseded by the *Petrogradsky Bank* case.

⁶Compare *The Denny*, 127 F.2d 404 (C.C.A. 3, 1942), an earlier decision by the same court. There the contest was as to the validity of three powers of attorney issued to Charles Recht and relating to a boat and its supplies purchased in the United States by Baltic Lloyd and Lietukis, Lithuania associations. Two of Recht's powers of attorney ran from Baltic Lloyd and Lietukis, concededly the owners of the boat and its supplies. The third ran from the Lithuanian State Steamship Line, an organization created by the

A similar conclusion was reached by the Fifth Circuit in *The Florida*, 133 F.2d 719 (C.C.A. 5, 1943), cert. den. 319 U.S. 774, and more recently by the District Court of the District of Columbia in *Latvian State Cargo and Passenger SS Line v. Clark*, 80 F. Supp. 683 (D. D.C. 1948).

The settled doctrine of American law that an unrecognized foreign government cannot deprive the lawful owner of his American assets is responsive to two considerations. First, there is the policy of the law against recognition of mere acts of force. "The decrees of the Soviet Republic nationalizing the Russian banks are not law in the United States, nor recognized as law (citing cases). They are exhibitions of power. They are not pronouncements of authority." *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank of New York*, 253 N.Y. 23, 170 N.E. 479, 481 (1930). Second, the political conclusion of the President to withhold recognition to any revolutionary or de facto government must be given full and affirmative respect by the courts. The Supreme Court has emphasized the broad power of the President, acting on advice of the Secretary of State, to determine policy with respect to recognition or nonrecognition. In *United States v. Pink*, 315 U.S. 203, 229, 62 S.Ct. 552, 565 (1942), the court con-

Russian Communists when they took charge of Lithuania. It was held that the powers of attorney from Baltic Lloyd and Lietukis were sufficiently authenticated as acts of those companies to be accepted in evidence but that the power of attorney from the state corporation was not proved.

When the Court of Appeals for the Third Circuit decided *The Maret* in 1945, it reviewed its 1942 decision in *The Denny* along with more recent Federal court decisions such as *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552 (1942), and announced the doctrine on which appellant relies. *The Denny* cannot be accepted, therefore, as authority for any conflicting view.

sidered the effect to be given to recognition of the Soviet Government of Russia and said:

“The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. ‘What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.’ *Guaranty Trust Co. v. United States*, supra, 304 U.S. page 137, 58 S.Ct. page 791, 82 L.Ed. 1224. That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.”

The President has determined that in the United States the government of China is the National Government of China. That government and that government alone is entitled to speak for China in this country. This political conclusion cannot be re-examined by the courts. “We would usurp the executive function if we held that that decision was not final and conclusive in the courts.” *United States v. Pink*, supra. Any other rule would produce chaos. “If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it

in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character." *Williams v. The Suffolk Insurance Company*, 13 Pet. (38 U.S.) 415, 420, 10 L.Ed. 226, 228 (1839).

The consequence is that as far as the courts of the United States are concerned and as far as property within the United States is concerned there is no government of China other than the National Government. The acts of Chinese Communists are, for purposes of this country and its courts, mere assertions of power. They confer no rights to assets in this country; they do not affect title to those assets; they are not to be recognized as law.

3. THE COMMUNISTS HAVE NO CLAIM TO THE GOVERNMENT STOCK IN THE BANK OF CHINA.

Appellant was specially chartered by the National Government on October 28, 1928 (R. 303) and its status was revised by order of the Ministry of Finance of that government on March 28, 1935 (R. 303). It became the international exchange bank for the National Government (R. 164) and it assumed many governmental functions. It became responsible for issuing bonds of the National Government in foreign markets, for handling public funds of the National Government both abroad and at home and for the government policy of trade promotion (R. 305). The National Government made contributions to the capital of the Bank (R. 164, 287) and eventually became the owner of two-thirds of its stock (R. 90, 287-8). The Bank was and is an arm of the National Government, a government which continues to function, which continues to be the principal stockholder of the Bank (R. 287-8) and

which continues to receive recognition from the United States (R. 347-8).

The claim of the Communists to the stock of the Bank is based, by their own account, on nothing but force. "Following Shanghai liberation Shanghai Military Control Commission East China Command *took over* government stocks on behalf government * * * " (R. 93) and "H. H. Kung T. V. Soong being war criminals *their stocks have been confiscated*" (R. 92). (Emphasis supplied.) This brief demonstrates that such efforts at confiscation by an unrecognized government create no claim to assets in the United States.

Moreover, even if the Bank as an adjunct to the National Government could be held to exist independently of that government, even if its articles could be read to refer to a government other than the National Government, the question of the identity of the government of China is not open to debate in this Court. "What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137, 58 S.Ct. 785, 791 (1938). In that case the Supreme Court held that a New York bank deposit of the Imperial Russian Government belonged during the period from 1917 to 1933 to the Kerensky regime, as the recognized Russian government, even though the Communists were actually in control of Russia and exercising de facto powers of government. As far as assets within the United States are concerned the recognized government of a foreign country is the government of that country for every purpose. This is the conclusion of the Supreme

Court in the *Guaranty Trust* case⁷ and that conclusion forecloses any claim which the Communists might attempt to assert here on the theory that their government is the government of China. Stock belonging by definition to the government of China belongs, for this reason alone and leaving all other considerations aside, to the National Government.

Thus the Communists are left on every score with no claim to appellant's San Francisco bank accounts. This is, indeed, the least difficult of all the cases arising from Communist conquest. In the ordinary case of Communist claims to American assets of captured corporations the Communists have seized the local assets of the corporation, they have taken control of the persons of the stockholders of the corporation, they have decreed nationalization of the corporation and its stock and they have put an end to all corporate activity. Here, by comparison, the Communists have been unable to seize the principal stockholder of appellant, they have been unable to seize the principal officers of appellant, they have been unable to put an end to appellant's activities and they are unable to claim in this Court that they have become the government of China. Since the decisions make it clear that even in the ordinary case the Communists have no claim to assets located in the United States, the result properly to be reached here seems particularly clear.

⁷For additional decisions to the same effect see *In re Grauds Estate*, 41 N.Y.S.2d 263 (Sur. Ct. 1943), 43 N.Y.S.2d 803 (Sur. Ct. 1943), 180 Misc. 558, 45 N.Y.S.2d 318 (Sur. Ct. 1943), 59 N.Y.S.2d 710 (Sur. Ct. 1945); *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396 (C.C.A. 2, 1927), cert. den. 275 U.S. 571; *Agency of Canadian Car & F. Co. v. American Can Co.*, 258 Fed. 363 (C.C.A. 2, 1919); *United States v. National City Bank of N. Y.*, 90 F. Supp. 448 (S.D. N.Y. 1950).

C. The Communists Cannot Be Heard to Assert a Claim to Appellant's Deposits with Wells Fargo.

Even if the Communists had a claim to appellant's bank accounts, that claim could and would not be considered by this Court. There are two reasons.

First. It is settled that an unrecognized foreign government cannot appear in any Federal court. "It is not denied that, in conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government. For this reason access to the federal and state courts was denied to the Soviet Government before recognition." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137, 58 S.Ct. 785, 791 (1937). This means that this Court will not hear any claim by or on behalf of the Chinese Communist Government even if it be assumed that the claim existed. Since the Communist claims before the Court have their origin with the "Shanghai Military Control Commission East China Command" (R. 93) or the "Central Peoples Government" (R. 94) or the "New Government" (R. 90), it is clear enough that even if they had validity they could not be heard. This perhaps explains the fact that the Communist representatives have not in this litigation actually made claim to the Wells Fargo deposits. Denied access to the courts to assert their claims directly they seek to give those same claims an indirect but equal effect by denying appellant the right to its deposits. The rule is not so easily evaded. Communists who cannot be heard to claim that the Wells Fargo deposits belong to them cannot be heard to claim that those deposits do not belong to appellant because they might belong to them. A claim that cannot be heard

to establish Communist ownership cannot, for the same reasons, be heard to defeat appellant's ownership.

Second. Even if the Communists were entitled to be heard in this Court in support of their claims and even if those claims had some validity, the Court as a matter of public policy would refuse to give them effect. Claims based upon foreign law or the activities of a foreign sovereign are enforced in the courts of the United States not as a matter of right but only as a matter of comity. "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' " *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S.Ct. 139, 143 (1895). See also *Second Russian Ins. Co. v. Miller*, 297 Fed. 404, 409 (C.C.A. 2, 1924), aff'd 268 U.S. 552; *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456, 460 (1934). That comity must and does yield to the public policy of the forum. "It [comity] is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests." *Bank of Augusta v. Earle*, 13 Pet. 519, 589, 10 L.Ed. 274, 308 (1839); *Hilton v. Guyot*, 159 U.S. 113, 165, 16 S.Ct. 139, 144 (1895); *Second Russian Ins. Co. v. Miller*, 297 Fed. 404, 409 (C.C.A. 2, 1924), aff'd 268 U.S. 552; *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259, 260 (1923). The federal courts for obvious reasons will not as a matter of public policy recognize transactions and claims which will

give aid and comfort to the enemies of the United States. "The investment was, therefore, a direct contribution to the resources of the Confederate government; it was an act giving aid and comfort to the enemies of the United States; and the validity of any transaction of that kind, from whatever source originating, ought not to be a debatable matter in the courts of the United States." *Horn v. Lockhart*, 17 Wall. (84 U.S.) 570, 580, 21 L.Ed. 657, 660 (1873). "The proposition that there is in many cases a public policy which forbids courts of justice to allow any validity to contracts because of their tendency to affect injuriously the highest public interests, and to undermine or destroy the safeguards of the social fabric, is too well settled to admit of dispute." *Sprott v. United States*, 20 Wall. (87 U.S.) 459, 463, 22 L.Ed. 371, 372 (1874). See also *Texas v. White*, 7 Wall. (74 U.S.) 700, 733, 19 L.Ed. 227, 240 (1868); *Kennett v. Chambers*, 14 How. (55 U.S.) 38, 48, 14 L.Ed. 316, 321 (1852). The armies of Communist China have undertaken to engage in an armed conflict with the armies of the United States. Under these circumstances no federal court will attend to claims having their origin with the Chinese Communists.

D. Appellant Is Entitled to Judgment Without Further Proceedings.

These cases are before the Court on appeals from orders of the District Court purporting finally to discharge appellant's claims against appellee. The orders were entered after hearing upon motions for summary judgment and to dismiss the actions. There has been no trial, nor is there any occasion for one. The facts which control the disposition of these cases are not in dispute. Wells Fargo

admits that Bank of China made the deposits with it (R. 67, 114-17, 120, 122, 137, 144; R. 12699, p. 15) and admits the demands for the return of the funds (R. 6; R. 12699, p. 16). It is undisputed, too, that the deposits belong either to appellant or to the Communists and that in the absence of the Communists' claims the funds would have been returned to appellant (R. 116-17, 144, 150, 330-31). This brief demonstrates that neither the claims which the Communists have made nor any claims that they might assert have or can have any effect upon the right of appellant to its moneys. This is the rule of law. That rule, applied to the undisputed facts of this case, makes it plain that appellant is entitled to immediate judgment.⁸ There is, therefore, nothing to try in these cases, and similar cases are regularly decided on the pleadings, affidavits, depositions and motions. See *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552 (1942); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 130, 58 S.Ct. 785 (1938), 100 F.2d 369 (C.C.A. 2, 1938), *Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438 (C.C.A. 2, 1940); *Latvian State Cargo & Passenger S.S. Line v. Clark*, 80 F.Supp. 683 (D. D.C., 1948); *Vladikavkazsky Ry. Co. v.*

⁸Appellant, entitled to immediate judgment should not have been subjected to indefinite postponement. Compare Marshall, C. J., in *Cohens v. Virginia*, 6 Wheat. 264, 404, 19 L.Ed. 257, 291 (1821). "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. * * * Questions may occur which we would gladly avoid but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty." See also *Southern Calif. Tel. Co. v. Hopkins*, 13 F.2d 814, 820 (C.C.A. 9, 1926) aff'd 275 U.S. 393. "Decision that there was power to hear and determine removed any question of discretion and left a bounden duty to proceed to a decree." and *Mutual Life Ins. Co. v. Krejci*, 123 F.2d 594 (C.C.A. 7, 1941); *Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321 (C.C.A. 4, 1937).

New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934); *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923).

There is no basis upon which the disposition of these cases by the District Court can be supported. What the court did was to dismiss the defendant and absolve it from all liability, order the money paid into court, deny the petition of the Communists—thus leaving only one party, the plaintiff, in the case—and then hold that this sole remaining party was not entitled to judgment. Such a startling conclusion was without precedent.⁹

Where, as here, the undisputed facts entitle a litigant to judgment, the appellate court may appropriately enter or direct the entry of judgment accordingly. See *City and County of Denver v. Denver Union Water Co.*, 246 U.S. 178, 38 S.Ct. 278 (1918); *North Carolina R. Co. v. Story*, 268 U.S. 288, 45 S.Ct. 531 (1925); *Mass. Bonding & Ins. Co. v. Santee*, 62 F.2d 724, 728 (C.C.A. 9, 1933); *Jensma v. Sun Life Assur. Co.*, 64 F.2d 457 (C.C.A. 9, 1933), cert. den. 289 U.S. 763; *Lydon v. New York Life Ins. Co.*, 89 F.2d 78, 83 (C.C.A. 8, 1937), cert. den. 302 U.S. 703; *Potter v. Beal*, 50 Fed. 860, 864 (C.C.A. 1, 1892).

⁹In *United States v. Pink*, 315 U.S. 203, 237, 62 S.Ct. 552, 568-9 (1942) Mr. Justice Frankfurter, concurring, said: "But adjournment, it may be suggested, is sometimes a constructive interim solution to avoid a temporizing and premature measure. . . ." It should be noted, however, that this suggestion was not adopted by the Supreme Court; that the New York Court of Appeals expressly repudiated a similar suggestion, as Mr. Justice Frankfurter notes; and it was in any event only a suggestion as to what a statutory liquidator might do. Justice Frankfurter did not in any way intimate that the Federal courts should become depositories of all the foreign funds in the United States.

CONCLUSION

It is respectfully submitted that appellant, Bank of China, should receive judgment in case No. 12698 for \$626,860.07, with interest at 7 per cent per annum on \$600,000.00 thereof from October 7, 1949, and on \$26,860.07 thereof from November 9, 1949, and costs of suit; and in case No. 12699 for \$171,724.57 plus interest thereon at 7 per cent per annum from April 26, 1950, and costs of suit.

A. CRAWFORD GREENE

MORRIS M. DOYLE

OWEN JAMESON

1500 Balfour Building
San Francisco 4, California

JAMES B. BURKE

72 Wall Street
New York 5, New York

*Attorneys for Appellant
Bank of China.*

McCUTCHEEN, THOMAS, MATTHEW,

GRIFFITHS & GREENE

1500 Balfour Building
San Francisco 4, California

BURKE & BURKE

72 Wall Street
New York 5, New York

Of Counsel.



Nos. 12,698-99

IN THE

United States
Court of Appeals

For the Ninth Circuit

BANK OF CHINA, a Corporation,

Appellant,

vs.

WELLS FARGO BANK & UNION TRUST CO.,
a Banking Corporation,

Appellee.

No. 12698

BANK OF CHINA, a Corporation,

Appellant,

vs.

WELLS FARGO BANK & UNION TRUST CO.,
a Banking Corporation,

Appellee.

No. 12699

Appellee's Opening Brief

LLOYD W. DINKELSPIEL

MARTIN MINNEY, JR.

EDWARD W. ROSSTON

HELLER, EHRMAN, WHITE &

McAULIFFE

14 Montgomery Street

San Francisco 4, California

Attorneys for Appellee

*Wells Fargo Bank &
Union Trust Co.*

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Nos. 12,698-99

IN THE

United States
Court of Appeals

For the Ninth Circuit

BANK OF CHINA, a Corporation,

Appellant,

VS.

WELLS FARGO BANK & UNION TRUST Co.,
a Banking Corporation,

Appellee.

No. 12698

BANK OF CHINA, a Corporation,

Appellant,

VS.

WELLS FARGO BANK & UNION TRUST Co.,
a Banking Corporation,

Appellee.

No. 12699

Appellee's Opening Brief

INTRODUCTION

Two cases are before this Honorable Court on appeal from decisions rendered by the District Court of the United States and from orders entered in accordance with those decisions. Both cases arose under similar circumstances. Attorneys purporting to act on behalf of Appellant Bank of China instituted these actions to recover moneys on

deposit with Wells Fargo Bank & Union Trust Co. After the cases were at issue attorneys for Appellant moved for summary judgment. Oral argument was had on this motion on December 19, 1949 (R. 327). At the close of the oral argument, District Court Judge Goodman reserved his ruling on the motion and set the cause for trial on December 29, 1949. Appellee held itself ready to proceed with the trial on that date, but at Appellant's request the Court continued the matter and fixed a new trial date of February 1, 1950.

On January 26, 1950 other attorneys also purporting to represent Bank of China, served on Appellee, in behalf of their clients (in their motion and hereinafter called Movants) notice of a motion to dismiss these actions or in the alternative for an order substituting themselves as attorneys for Bank of China. The basis of this alternative motion was a claimed lack of authority of those persons who engaged attorneys for Appellant to speak for the Bank of China.

This motion was argued before the District Court on January 30, 1950. On that day Judge Goodman entered his order that both the motion for summary judgment and the alternative motion for dismissal or substitution be submitted on briefs and took the matter off calendar for February 1. After presentation of briefs by the two groups of attorneys purporting to represent the Bank of China, the District Court rendered its opinion on July 18, 1950 (R. 96). An order in accordance with that opinion was signed and entered on August 7, 1950 (R. 106). The order did not, as Appellant states on page 7 of its Opening Brief, "finally" deny the Bank of China access to its demand deposit. On the contrary, the purpose and effect

of the Court's order was only to preserve the status quo until such time as the Court could conclusively determine which group of claimants had authority to act for the Bank of China.

The terms of the order entered by the District Court are as follows:

- (1) The trial was continued sine die.
- (2) Appellant's motion for summary judgment was denied without prejudice.
- (3) Movants' motion for dismissal, or in the alternative for substitution of attorneys, was denied without prejudice.
- (4) Appellee was permitted to deposit in the Registry of the Court, subject to its further order, the sum subject to the rival claims.
- (5) Appellee was relieved of all liability for interest.
- (6) Upon deposit of the aforesaid sum, Appellee was to be discharged from all liability in the premises, and all those persons purporting to act for the Bank of China were restrained from taking any proceedings to enforce their claims to the said sum against Appellee.
- (7) Appellee's right to assert a claim against the aforesaid sum for costs and attorney's fees was reserved.
- (8) Provision was made for notice to counsel of all further proceedings.

It is this order which Appellant asks the Court of Appeals to review. If Appellant now possesses conclusive proof of its authority to act for and as the Bank of China, a far more appropriate remedy than appeal would be an

application addressed to the District Court to have the case set for trial. The District Court of the United States was of the opinion that the facts before it on the submitted motions, and now before this Court, did not clearly establish Appellant's authority. It entered the order appealed from to protect the Bank of China, its stockholders and depositors, and postponed trial and decision until the story could be completed and all the facts could be presented (R. 105). It is this order of continuance which Appellant now asks the Court of Appeals to overturn.

STATEMENT OF THE CASE

Appellee believes that it is necessary to supplement Appellant's statement of the case in order to clarify its position and the reasons for its refusal of Appellant's demand.

Appellee admits that the sums claimed in the two complaints on file herein (Nos. 12,698, 12,699) were deposited with it in the names of the various branches of the Bank of China as set forth in the record. (No. 12,698, page 7; No. 12,699, page 15.) Appellee at all times has been ready to pay these deposits to the persons legally entitled thereto. Its only interest throughout this controversy has been to pay the deposits to such legally entitled persons and to secure a final acquittance from those authorized to give it.

Appellee became an involuntary stakeholder when conflicting demands were made for these deposits. On June 27, 1949, Appellee received a cable emanating from Shanghai, signed "Bank of China, Shanghai, China," and in the established test key for communication between Wells Fargo Bank & Union Trust Co. and the Bank of China (R. 67, 134). The cable stated that the Bank of China had been taken over by the Shanghai Military Control Commission

by order of the Chinese People's Liberation Army, East China Command; that the refugee officers of the Bank of China had been dismissed and could no longer represent the Bank; that their signatures and test key were void and that all communications from them were unauthorized; and instructed Appellee not to make payments from the Bank of China accounts except by specific order of the sender.

On June 30, 1949, Appellee received another cable from the same source to the effect that the purported Foreign Department of the Bank of China operating in Hong Kong was illegal, and transactions with it were null and void (R. 68, 138).

On October 7, 1949, Appellee received a demand from the Bank of China, Hong Kong for transfer of \$600,000.00 to Bank of China, New York Agency. This demand was made in the name of the purported "Foreign Department, Head Office" of the Bank of China (R. 244), then purportedly located in Hong Kong (R. 261).

Thereafter, on November 9, 1949, further demand was made for this sum of \$600,000 and for the additional sum of \$26,860.07 by the filing of the complaint in action No. 12,698 (R. 3). On April 26, 1950, appellant made a demand for \$171,724.57 by the filing of the complaint in action No. 12,699 (No. 12,699, R. 4, 15-16). Faced with these conflicting demands and the chaotic conditions in China, Appellee wanted greater proof of the authority of those demanding deposits standing in the names of the various branches of the Bank of China. Since proper proof of corporate authority was not forthcoming, Appellee suggested an action to recover the deposits so that a court could render a binding decision on the question of corporate authority and the right to receive the deposits.

SUMMARY OF ARGUMENT

Appellee's position is that of an involuntary stakeholder of a bank deposit, caught between two rival groups of claimants, each purporting to exercise the authority of the depositor. It has acted in good faith throughout these proceedings with the sole aim of paying the deposits to the persons legally entitled thereto. It refused Appellant's demands because of other claims to the same deposits and because of doubts as to Appellant's corporate authority. The complex nature of the legal questions involved and the confusing and chaotic factual background of the controversy over ownership of the deposits influenced Appellee to seek a court adjudication as to the validity of the rival claim. That was for Appellee the only way to protect itself from the possible risk of having to pay approximately \$800,000.00 twice.

Appellee opposed a summary judgment because it wanted a full disclosure of the facts upon which Appellant's authority was based. Some of these facts relating to the internal affairs of the Bank of China would be available to Appellee only upon cross examination of Appellant's witnesses. Appellee was ready for an early trial of the issues involved, and stated to the Court that it was willing to proceed at the Court's and Appellant's convenience (R. 335).

The trial date was set for December 29, 1949, but was continued at *Appellant's* request. It was after this postponement that Movants attempted to enter the case. Appellee could not interplead at an earlier date because one of the two conflicting claimants was not within the jurisdiction of the court. Moreover, it is doubtful whether interpleader was available because of the peculiar nature of the controversy, viz., a dispute over the internal control

of a corporation. Appellee did all it could do under the circumstances. The law does not force a bank to choose between rival claimants to a deposit where there is a risk of being held twice for a deposit, in this instance of approximately \$800,000.00.

Appellee contends that this appeal should be denied and that the order of the District Court should stand for the following reasons:

1. The order appealed from is not a final order and is not appealable.
2. Appellee should not be charged with interest for the use of the deposit.
3. Appellee should not be required to decide at its peril the bona fide factual dispute on the issue of corporate authority.
4. There is no clear cut decision which decides the precise question before this court.
5. Appellee should not be required to decide at its peril unanswered legal questions as to the effect of political recognition of a country.
6. An Appellate Court should not disturb the wide discretion of a trial judge in granting or refusing continuance of a trial.

ARGUMENT

- I. **Judge Goodman's Order Is in Essence Interlocutory, Merely Continues the Case for Trial and Is Not Appealable.**

PERTINENT STATUTES

²⁸
~~12~~ U.S.C. Section 1291. "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States * * *"

²⁹
~~12~~ U.S.C. Section 1292. "The Courts of Appeals shall have jurisdiction of appeals from (1) Interlocutory orders

of the District Courts of the United States, * * * granting * * * injunctions * * *

A. Continuance of the Trial Date Is Not an Appealable Order.

The main purpose of the order entered by the District Court was to preserve the status quo until such time as the facts could be presented to the court (R. 105). All other provisions of the order are incidental to the continuance sine die and must be reviewed in that light.

In *Bedgisoff v. Cushman*, 12 F.2d 667 (C.C.A. 9, 1926) the Appellate Court issued a writ of mandamus requiring a trial court to set a case for trial within a reasonable time not later than six months from the date of the mandate. The case was an action for breach of contract to remit a sum of money to a bank in Russia. The trial court had continued the case at the request of the defendant on the ground of defendant's inability to secure evidence essential to its defence because of the chaotic conditions in Russia and the lack of political recognition. The order of the trial court continued the matter until four months after recognition of Soviet Russia by the United States. After the lapse of five years plaintiff filed a petition for a writ of mandamus in the Circuit Court of Appeals for the Ninth Circuit. Defendant argued that plaintiff had no standing to obtain the writ because of his failure to appeal from the order granting the continuance. The Circuit Court of Appeals overruled defendant's argument on the ground that an order of continuance is not a final appealable order.

The continuance did not determine the case on its merits and did not deny the plaintiff its right to be heard. It merely affected the time of the hearing. It is to be noted that the Circuit Court of Appeals affirmatively recognized that a

trial court may continue a case for a reasonable time until evidence becomes available, but held that five years was sufficient time. No such period has elapsed in the case now before the court.

Appellant's remedy is not by appeal to this court. If it can now produce evidence sufficient to establish its corporate authority, it should seek an order from the trial court fixing a date for trial.

B. The Denial Without Prejudice of Appellant's Motion for Summary Judgment Is Not a Final Appealable Order.

The denial of a motion for summary judgment is not a decision on the merits. Even where a motion for a summary judgment is denied with prejudice, the denial still leaves the issues raised by the pleadings to be tried.

Marcus Breier Sons, Inc. v. Marvlo Fabrics, Inc.,
173 F.2d 29 (C.A. 2, 1949);

Jones v. St. Paul Fire and Marine Ins. Co., 108 F.2d
123 (C.C.A. 5, 1939);

In re Finkelstein, 102 F.2d 688 (C.C.A. 2, 1939).

C. The Denial Without Prejudice of Movants' Motion for Dismissal or in the Alternative for Substitution of Attorneys Is Not a Final and Appealable Order.

Appellant is not aggrieved by that order. Appellant asks no relief against Movants. Its complaint is directed against Appellee alone. The order grants nothing to Movants. They remain in the same position which they occupied before their motion was filed. The order merely furthers the trial court's purpose in preserving the status quo pending a full hearing on the merits.

D. An Order Permitting the Deposit of Funds in Court Is Not a Final Order and Is Not Appealable.

Such an order merely brings the fund into court for preservation pending litigation and is interlocutory.

Louisiana National Bank v. Whitney, 121 U.S. 284, 7 Sup.Ct. 897 (1887);

Norris Safe and Lock Co. v. Manganese Steel Safe Co., 150 F. 577 (C.C.A. 9, 1907).

E. The Order Relieving Appellee from the Payment of Interest and Discharging It from Liability Is Incidental to the Order for Deposit and Is a Usual Concomitant of Such an Order.

It merely furthers the purpose of the court in preserving the status quo pending a full hearing on the merits and is incidental but not essential to the interlocutory order. It prevents loss to a stakeholder through the postponement of the trial.

F. The Order Restraining Appellants from Enforcing Against Appellee Any Claim to the Sum on Deposit in the Registry of the Court Is Not Essential to the Rest of the Order.

Even though the injunctive provisions of Judge Goodman's order be appealable under *28 U.S.C., Section 1292*, they are nevertheless separable from the rest of the order, which is clearly interlocutory and not appealable. The incidental injunctive feature is only present to give further protection to the stakeholder after its deposit of funds in the Registry of the court and pending a trial on the merits.

G. Appellant Misrepresents the Effect of Judge Goodman's Order.

1. WHEN IT STATES THAT THE BANK OF CHINA IS "FINALLY DEPRIVED" OF ITS ASSETS.

The purpose and effect of the order is to *preserve* those assets for the Bank of China until such time as a court

can determine which group is the Bank of China. No one is finally deprived of any assets. The funds repose in the Registry of the District Court of the United States and will be paid out upon proof of authority to receive them.

Neither Movants nor the People's Government of China obtain anything from the order of the District Court. Movants are relegated to the same position they occupied before they made their motion. The District Court gives no recognition to any claim emanating from the People's Government of China. Neither Movants nor Appellant have proved their cases, and the effect of the order of the District Court is to maintain the status quo until one of them can do so.

2. WHEN IT COMPARES THE ORDER OF THE DISTRICT COURT TO "A DECLINATION OF JURISDICTION."

Cohens v. Virginia, 6 Wheat. 264, 404; 12 L.Ed. 257, 291 (1821) and other cases cited in the footnote on page 27 of Appellant's Opening Brief have no bearing on the order appealed from here. These cases refer to dismissal of a complaint without hearing when a trial court has jurisdiction.

The District Court did not decline to exercise its jurisdiction. Judge Goodman's order took jurisdiction of the case for hearing and *continued that jurisdiction* until sufficient evidence was available. There was an affirmance of jurisdiction, and there was no attempt to dismiss the case without exercising jurisdiction. By entering its order for a continuance the District Court clearly indicated that it will decide the case on the merits after a full hearing which will be held in the future on the motion of any proper party.

II. Appellee Should Not Be Charged with Interest for the Use of the Deposit.

As appears from the statement of facts of this case, Appellee did everything in its power to bring both claimants to the bank deposit before the court for an adjudication. It held itself available to proceed to trial and did all it could do under the circumstances, consistent with its duty to its own depositors and shareholders not to expose itself to a risk of double liability.

A. APPELLANT IS NOT ENTITLED TO ANY INTEREST ON THE DEPOSIT FOR THE PERIOD BEFORE AUGUST 14, 1950.

It appears in the record that Appellant's demand for \$600,000.00 was made on Appellee on October 7, 1949 (R. 4, 6), its demand for \$26,860.07 on November 9, 1949 (R. 4, 6), and its demand for \$171,724.57 on April 26, 1950 (No. 12699, R. 4, 15-16). The rival claimants to the deposits (or undisputedly at least one of them) were in China, beyond the jurisdiction of courts of the United States. Appellee could not interplead the rival claimants, nor could it secure a judgment binding them. It acted as expeditiously as it could under the circumstances. A bank should not be forced to choose at its peril between two adverse claimants to a deposit. Appellee took steps to deposit the sum in dispute in the Registry of the court within a reasonable time after both claimants had appeared in this action. It deposited \$626,860.07 in the Registry of the District Court of the United States in Action No. 12698 on August 14, 1950 (R. 393), and on the same date deposited \$171,724.57 in the Registry of the Court in Action No. 12699 (No. 12699, R. 34). Under such circumstances, Appellee should not be charged with interest which may have accrued before that date.

In *Illinois Banker's Life Assurance Co. v. Blood*, 69 F. Supp. 705 (N.D., Ill., E.D. 1947) the court relieved an insurance company of liability for interest for a much longer period under similar conditions. One of the adverse claimants to the proceeds of an insurance policy issued by the Assurance Company was in the military service and overseas for *four* years. During that time he was not subject to service in an interpleader action. The Assurance Company filed in interpleader and deposited the proceeds of the policy in court approximately three months after his return to the jurisdiction of the court. The United States District Court (N.D. Ill.) held that this was a reasonable time and relieved the Assurance Company of any liability for interest, either for the four year period or for the three months period. The court found that the involuntary stakeholder had acted with reasonable diligence in attempting to dispose of the insurance proceeds without subjecting itself to possible additional liability. The court obviously was influenced by the inability of the claimants to resolve their conflicting demands. Because of this conflict neither claimant was in a position to demand payment.

This case is directly in point and upholds the decision of the United States District Court which relieves Appellee of liability for interest.

B. APPELLEE CERTAINLY IS NOT LIABLE FOR INTEREST AFTER AUGUST 14, 1950, THE DATE OF DEPOSIT OF FUNDS IN THE REGISTRY OF THE DISTRICT COURT.

Where a sum or disputed fund which is the subject of litigation is deposited in court, interest is not recoverable on it during the time it remains so deposited. The stake-

holder derives no benefit from the use of the fund during that interval.

Fox v. Lofland, 98 F.2d 589, 593 (C.C.A. 3, 1938).

C. EVEN APART FROM THE PRINCIPLES STATED IN A AND B ABOVE, APPELLANT IS NOT ENTITLED TO INTEREST ON ANY OF THE DEPOSITS AFTER DECEMBER 27, 1949.

Appellee was ready to proceed to trial on December 29, 1949. On December 27, 1949 the trial date was continued *at Appellant's request*. At that time no rival claimant had attempted to enter the case. All further delays were occasioned by the entrance into the case on January 26, 1950 of Movants and by the controversy between Movants and Appellant. Those delays cannot be charged to Appellee.

A continuance requested by a party suspends his right to receive interest during the delay occasioned thereby.

Rasmussen v. National Popsicle Corp., 105 F.2d 759 (C.C.A. 9, 1939).

III. Appellee Should Not Be Required to Decide at Its Peril the Bona Fide Factual Dispute on the Issue of Corporate Authority.

Doubts as to Appellant's authority to act for and in the name of Bank of China would alone justify Appellee's action in refusing Appellant's demand until such time as proof of its authority was forthcoming. The record raises many questions bearing on this issue.

A. The record sheds doubt on the legality of the removal of the head office of the Bank of China from Shanghai, and hence on the validity of the demand for the \$600,000.00 which came from Hong Kong and was purportedly made by the Bank of China, Head Office, Foreign Department.

B. The record sheds doubt on the validity of Hsi Te-Mou's appointment as general manager of the Bank of China and on his authority to direct institution of these suits, and hence also on the validity of the demands for the \$626,860.07 and \$171,724.57.

C. Conditions in China shed doubt on the continuing authority of Hsi Te-Mou as general manager of the Bank of China.

D. The record and conditions in China shed doubt on the scope and continuing validity of T. Y. Lee's Power of Attorney, by virtue of which he allegedly directed institution of these suits.

E. The record sheds doubt on the authority of the Directors of the Bank of China.

F. The record shows the absence of annual shareholders' meetings.

G. The record demonstrates the confusion in the administration of the internal affairs of the Bank of China.

When faced with these doubts the District Court decided to maintain the status quo until they could be resolved. When they can be resolved (and appropriate evidence is or should become available to resolve them) the District Court will undoubtedly set the case for trial. At that time a valid judgment can be rendered after a full hearing, fair to all the parties, and protecting Appellee from the risk of double liability.

Obviously the District Court did not wish to decide such important issues on affidavits or on a preliminary motion for summary judgment (R. 332). A motion for summary judgment should be granted only where all facts upon which the summary judgment is to be based are admitted or clearly established.

American Optical Company v. N. J. Optical Company, 58 F. Supp. 601, 606 (D.C.D. Mass. 1944);
Fleming v. Phipps, 35 F. Supp. 627, 630 (D.C.D. Md. 1940);
Clair v. Sears Roebuck, 34 F. Supp. 559 (D.C.W.D. Mo. W.D. 1940).

The record amply demonstrates that many of the facts upon which Appellant's right to recover is based are neither admitted nor clearly established.

In May, 1949, the People's Liberation Army overran Shanghai, and before the institution of these actions had also overrun Tientsin and Tsingtao. Officials and Directors of the Bank of China, as it had existed prior to May, 1949, scattered and fled. Two Directors disappeared; two remained in occupied China; others came to the United States; still others went to Formosa (R. 92-93, 103, 183). Prior to the occupation of Shanghai by the People's Liberation Army, the Head Office of the Bank of China was located in Shanghai (R. 304). That office was purportedly moved from Shanghai to Canton (R. 35, 195, 298), from Canton to Chungking (R. 36, 298), and finally from Chungking to Formosa (R. 298).

These were not normal circumstances. The hasty flights and forced removals furnished the background against which Appellee had to view the conflicting claims to the deposits. These circumstances widened and gave color to the doubts raised by the conflicting claims themselves.

Appellee wanted further proof of the authority of the groups demanding the deposits. For reasons beyond the knowledge of appellee, this proof was not forthcoming.

IV. There Is No Clear-Cut Decision Which Decides the Precise Question Before This Court.

Judge Goodman was correct when he stated:

“Research reveals no case, with facts sufficiently similar to those of the present controversy, to be accepted as a controlling precedent.” (R. 101)

Appellant places great reliance on *Guaranty Trust Co. v. U. S.*, 304 U.S. 126, 140, 58 S.Ct. 785, 792-793 (1938) and states that it would protect appellee from double liability. Appellee wishes it could regard that case with such certainty as a bar to further liability. Unfortunately it cannot. Recognition or non-recognition by the State Department is not the universal panacea for Appellee's troubles that Appellant would have the court believe.

In the *Guaranty Trust* case the United States was asserting a claim to a bank deposit made originally by the Imperial Russian government. The United States had been assigned the claim to that deposit by the Russian Soviet government under the terms of the Litvinov assignment, which accompanied recognition of the U.S.S.R. by the United States. The depositary's defense was based on the New York Statute of Limitations. The depositary had set off a claim of its own against the deposit and had so notified its depositor. The court held that the Statute of Limitations had run against the claim during the period of non-recognition of the U.S.S.R. Even though the Soviet government could not appear in the courts of the United States while it was unrecognized, the recognized (but deposed) Kerensky government could have brought suit. Since it did not, the depositor's right to challenge the set-off was lost.

The instant case does not present similar facts. Here, the depositor is a corporation and not a government; no Statute of Limitations is available to protect appellee from double liability; Appellee has not made any attempt at set-off, nor can it; there is no binding judgment upon which appellee can rely. The broad statements of the court in the *Guaranty Trust case* must be read in connection with the facts of the controversy.

At page 12 of its brief Appellant quotes the following sentence from the Supreme Court's decision in the *Guaranty Trust case*:

"The very purpose of the recognition by our government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are."

The court was there referring to a transaction with a foreign government and a right barred by the Statute of Limitations. The Bank of China is a private corporation. Other language of the opinion adds to the impression that the court was confining its opinion to rights barred by Statute or by judgment.

Later cases lend credence to this interpretation of the court's language. In *Koninklijke Lederfabriek "Oisterwijk" N. V. v. Chase National Bank*, 177 Misc. 186, 30 N.Y.S. 2d 518, 527 (Sup. Ct. 1941), aff'd. 263 App. Div. 815, 32 N.Y.S. 2d 131 (1941), motion for leave to appeal den. 35 N.Y.S. 2d 717 (1942), the court, in discussing the *Guaranty Trust case*, stated:

"Recognition does not alter the legal consequences of previous recognitions, and if plaintiff here recovers a *judgment* based upon our government's present

recognition of the Netherlands government now functioning in London, that *judgment* will be conclusive as against a claim based upon a later recognition of a successor government." (Emphasis added.)

Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (C.C.A. 2, 1940) passed on the validity of a purchase of silver by the Federal Reserve Bank from the then recognized Loyalist Government of Spain. Payment was made to the Loyalist Government, which had acquired the silver in its own territory by seizure from the Banco de Espana. After the Franco regime had been established in Spain the Banco de Espana, attempted to recover the silver or its value. The court found that the Federal Reserve Bank was protected by the completed transaction with a recognized regime. The court was dealing with the seizure of physical property located in territory under the de facto control of a recognized government. The facts of the instant case are not so simple as these. The "seizure" or "succession" to control of the Bank of China took place in territory *not* under the de facto control of the government upon whose recognition Appellant relies.

United States v. National City Bank of New York, 90 F. Supp. 448 (S.D. N.Y., 1950) was a suit brought by the United States, as assignee of the U.S.S.R., to recover funds deposited with defendant bank by the Russo-Asiatic Bank prior to the Soviet Revolution. The Soviet regime had nationalized the Russo-Asiatic Bank, and after recognition by the United States, had assigned its rights to the assets of that Bank to the United States. The court started with the proposition that recognition of the U.S.S.R gave *retro-active* validity to the Soviet nationalization decrees. It denied recovery by the United States *only because* of a

valid set-off by the defendant Bank. Defendant Bank held certain treasury notes of the Kerensky regime and the court ruled that the liability on those notes passed from the Kerensky government to the Soviets.

Wells Fargo Bank & Union Trust Co. has no set-off upon which it can rely to escape double liability.

California Banking Code, Section 952, cited by Appellant in the footnote on page 12 of its brief, does not determine the present controversy. This is not a case of two claimants to an account, but one of two groups claiming control of a corporate depositor. These groups are not "adverse claimants" to an account within the meaning of the statute. Compare *Koninklijke Lederfabriek "Oisterwijk" N. V. v. Chase National Bank*, 30 N.Y. S.2d 518, 525 (1941).

The leading case of *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank of New York*, 253 N.Y. 23, 170 N.E. 479 (1930) cert. den. 282 U.S. 878, 51 S.Ct. 82 (1930) awarded a deposit made by a Russian bank chartered by the Imperial Russian government to certain emigré directors who had brought suit in the name of the Bank. They had filed the suit after the Soviet Revolution and during the period before recognition of the U.S.S.R. by the United States. The basis of the decision was that Soviet nationalization decrees are "not recognized as law in the United States." In view of the statement of the United States Supreme Court in the *Guaranty Trust* case that the effect of recognition or non-recognition is a judicial question, and more particularly of *United States v. Pink*, 315 U.S. 203, 62 Sup.Ct. 552 (1942), the basis of the Petrogradsky decision is somewhat questionable. The *Pink* case did give *retroactive* extraterritorial effect to a Soviet confiscation decree. See Note, 139 A.L.R. 1209, 1219.

The very words of Justice Cardozo (then sitting on the New York Court of Appeals) in the *Petrogradsky case* emphasize Appellee's dilemma. At page 485 he lightly dismissed the dangers of double liability with the words:

"The chance of double payment is a common risk of life."

The risk of paying \$800,000 twice is one which Appellee does not feel it should be called upon to take. At the very least it should not be charged with interest for a bona fide attempt in behalf of its depositors and stockholders to avoid such a risk.

The World War II cases cited by Appellant on page 17 *et seq.* of its opening brief are not decisive of the issues confronting Appellee.

Koninklijke Lederfabriek "Oisterwijk" N. V. v. Chase National Bank, 177 Misc. 186, 30 N.Y.S. 2d 518 (Sup. Ct. 1941), *aff'd* 263 App. Div. 815, 32 N.Y.S. 2d 131 (1941), motion for leave to appeal *den.* 35 N.Y.S. 2d 717 (1942), was an action brought by a Dutch corporation in exile against the Chase Bank to recover a deposit. The corporation and some of its officers made their way out of the Netherlands before the German occupation. The Germans meanwhile had occupied Holland and had taken over the Dutch assets of the corporation. Its German successors were claiming the same deposit. The distinction between the *Koninklijke* case and the instant matter lies in the fact that the Netherlands government was more foresighted than the Chinese Nationalist regime. It had passed a law allowing Dutch corporations to shift their corporate domicile from the Netherlands to other Dutch territory. Plaintiff was able to show *proper corporate action* in compliance with that law, and hence could establish its corporate au-

thority. Appellant in the instant case has made no such showing of authority.

The comparatively lesser risk of the "stakeholder" in the *Koninklijke case* is further emphasized by a New York Statute which must have given the Chase National Bank a great measure of reassurance. Chapter 150 of the Laws of 1941 amended Section 134 of the Banking Law of New York to provide, in general

"that a bank or trust company need not recognize or give effect to claims, advices, statutes, rules or regulations emanating from territory dominated by authority not recognized by the United States" (30 N.Y.S. 2d at 527).

This strong declaration of the public policy of the State of New York does not aid Wells Fargo Bank & Union Trust Co. in this case. California has no similar statute.

Amstelbank N. V. v. Guaranty Trust Co., 177 Misc. 538, 31 N.Y.S. 2d 194 (1941) is a case with facts substantially identical to those before the court in the *Koninklijke case* and is of no greater help in resolving Appellee's dilemma.

In *A/S Merilaid & Co. v. Chase National Bank of the City of New York*, 189 Misc. 285, 71 N.Y.S. 2d 377 (1947) an Estonian corporation which had shifted its seat to Sweden prior to the incorporation of Estonia into the Soviet Union, was attempting to collect the New York bank account of the corporation. After its removal to Sweden, the corporation had been nationalized by the Estonian Soviet Socialist Republic and its Estonian assets had been seized. The court found that a meeting of the shareholders representing a majority of the stock occurred in 1945 in Sweden. That meeting transferred the seat of the corporation from Estonia to Stockholm, re-elected the former directors and

authorized them to withdraw the funds on deposit with defendant to be used in continuing the corporation's business. Corporate authority was thus established.

No such showing is made here. In fact, the record discloses no stockholders' meeting of the shareholders of the Bank of China since 1948 (R. 170, 237). Nor is there any evidence of an amendment to the Articles of Incorporation of the Bank of China to effect a change in the location of the corporate domicile.

Fred S. James Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 364 (1928), was an action by a creditor of a Russian insurance company to set aside as fraudulent the transfer of assets by the Russian insurance company to a Connecticut insurance corporation which had been organized by the Russian company. At the time of the creation of the Connecticut corporation the Russian company was not insolvent, but a Soviet decree had provided for nationalization of all Russian insurance companies and the Soviet Government was taking over their assets. Obviously, the court was not faced with a problem of double liability on the part of a depository, and the case does not decide the present controversy.

Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924), was a suit brought by an *individual* depositor against the National City Bank, a domestic corporation, to recover a deposit. The individual plaintiff had deposited dollars in the New York branch of the National City Bank, and that Bank had undertaken to pay plaintiff the equivalent of his deposit in rubles at its Petrograd branch. After this transaction the Soviet Government nationalized all banks in Russia and confiscated their deposit accounts. The

court held that this did not affect defendant's liability to plaintiff. The bank's liability was not to re-deliver earmarked assets which had been confiscated when physically present in Russia. It was a liability to pay a sum of money.

The *Sokoloff* case is not direct precedent for the instant controversy because the National City Bank was a domestic corporation and the Soviet confiscation decree must necessarily have been a mere confiscation of assets. Russia had no jurisdiction to dissolve the bank or to control its corporate affairs. The Bank of China is a Chinese corporation with its corporate domicile at Shanghai. If there was no effectual removal of its domicile from Shanghai, it remained subject to the governmental powers of the government which controlled Shanghai. An additional distinguishing factor is that the plaintiff in the *Sokoloff* case was an individual, so that no question of corporate authority was before the court.

Federal cases cited by Appellant do not appreciably clear the atmosphere in which Appellant would force Appellee to choose between rival claimants to control of the Bank of China.

The Maret, 145 F.2d 431 (C.C.A. 3, 1944), involved nationalization of a shipping vessel by the Soviet Government of Estonia after occupation of Estonia by the U.S.S.R. (not then recognized by the United States). The vessel was in the Virgin Islands at the time of its nationalization. The court held that the decrees of the unrecognized Estonian Government could not affect ownership of the vessel. The rationale of this decision was that the vessel was physically beyond the jurisdiction of the de facto government of Estonia. So far as the record in the present case indicates, the corporate domicile of the Bank of China was never

properly transferred from Shanghai, and Shanghai is under the de facto control of the unrecognized Chinese Government.

The Florida, 133 F.2d 719 (C.C.A. 5, 1943), Cert. den. 319 U.S. 774, 63 S.Ct. 1439 (1943), was a similar case where a vessel located in Cuba was nationalized at the time Estonia was overrun by the U.S.S.R. The Court stated that the record did not contain clear and convincing proof of ownership by a former owner still in occupied Estonia or by the Estonian State Steamship Co., a creature of the occupying Russian Government. The claim of title of the Estonian State Steamship Company was based upon a confiscation decree of the unrecognized government. The lack of clear evidence and the fact that the vessel was physically beyond the jurisdiction of the de facto government influenced the court to reach the same decision as it had in *The Maret*.

These cases both involved a dispute over the ownership of a particular res. *The Maret* was concerned with the right to receive a fund deposited by the United States when it took over a ship. *The Florida* was a dispute over the ownership of the vessel itself. Obviously in these *in rem* proceedings there was no chance of double liability.

Latvian State Cargo and Passenger S. S. Line v. Clark, 80 Fed. Supp. 683 (D. D.C. 1948), was another case with substantially similar facts. It, too, involved a vessel beyond the physical jurisdiction of the regime purporting to nationalize it.

The last three cases discussed all involved claims asserted by a new Soviet-controlled corporation, and, hence, the question of authority to represent the original corpo-

rate owner was not involved. The Bank of China case presents an issue of authority to act for the original corporate depositor.

Appellant states at page 24 of its opening brief that an unrecognized foreign government cannot appear in any federal court. Throughout its brief Appellant treats its rival claimant as the People's Government of China. It overlooks the fact that the claim as made to Appellee was made by "Bank of China, Shanghai," and that the Movants' position before the District Court was that they, and not Appellant, had the authority to represent the Bank of China. This presents a question of corporate authority. The Bank of China is a corporation which was chartered by a recognized government. As such it has standing before this or any other federal court. The question before the court is, "Who is authorized to represent the Bank of China?" It was this question on which the District Court felt that there was not now such clear and convincing proof as to warrant a decision. For that reason it entered its order of continuance.

V. Appellee Should Not Be Required to Decide at Its Peril Unanswered Legal Questions as to the Effect of Political Recognition of a Country.

Appellant quotes *Guaranty Trust Co. v. U. S.*, 304 U.S. 126, 137, 58 S.Ct. 785, 791 (1938) (Opening Brief, page 22), as decisive of this case:

"What government is to be regarded here as a representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government."

Appellee, risking double liability for \$800,000, cannot be as

easily satisfied. On further perusal of the *Guaranty Trust* decision it reads in the next sentence but one:

"Its action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, *although they are free to draw for themselves its legal consequences in litigations pending before them.*" (Emphasis added).

It is just such a judicial determination which Appellee wants—a determination of the rightful claimant to the deposit.

Appellee should not be required to answer the many perplexing questions of law at its peril. Among the complex legal questions awaiting decision are these:

A. THE RETROACTIVE EFFECT OF RECOGNITION.

U. S. v. Pink, 315 U.S. 203, 62 S.Ct. 552 (1942), holds that recognition gives effect to the decrees of the government recognized retroactive to the date of their enactment. This decision gives Appellee pause. While recognition of the People's Government of China seems highly unlikely today, it did not seem quite so improbable at the inception of this controversy. Who can say what the situation will be five years hence? The *Pink case*, involving recognition of Soviet Russia after fifteen years, demonstrates how world opinion changes. The eventual claimant of the funds deposited in the *Pink case* was the United States. It had become the assignee of the Russian Government. Who can say but that the eventual claimant of the Bank of China's funds may be the United States as an assignee of Chinese claims?

If perchance the United States should some day recognize the People's Government of China, that might give retroactive validity to the events of 1949. Would that impose a double liability on Appellee?

B. THE LEGAL CONSEQUENCES OF RECOGNITION OF NATIONALIST CHINA AND NON-RECOGNITION OF THE PEOPLE'S GOVERNMENT OF CHINA.

Appellant recognizes that United States courts do give some effect to the actions of a de facto government, even though it is not a recognized government. It necessarily recognizes this limited existence of a de facto government when it cites the cases listed at the bottom of page 14 of its Opening Brief.

It is settled law that United States courts will give effect to the acts of a de facto regime which is established and in effective control of an area, so far at least as the matters involved are within its territorial jurisdiction. This is particularly true where the issue before the court involves only nationals of the occupied territory.

The controversy now before the court is one over the control of a Chinese corporation, the Bank of China. It is a controversy between two groups of Chinese nationals. A domestic corporation, Wells Fargo Bank & Union Trust Co., is an involuntary stakeholder of assets belonging to the Chinese corporation. It is caught in the middle of the dispute.

Appellants claim that they are the only ones authorized to speak for the Bank of China. Movants take the same position, arguing that the corporate domicile of the Bank of China was and is Shanghai; that the corporation was never validly moved from China to Formosa; that the situs

of the corporate stock is the domicile of the corporation, viz. Shanghai; that both the corporation and its stock are located within territory subject to the de facto People's Government of China; and that Movants succeeded to ownership and control of the corporation by virtue of the acts of the de facto government of China.

The opinion of the District Court, cites several decisions giving limited effect to the acts of an unrecognized de facto government (R. 102). Noteworthy among these decisions are the following:

U. S. v. Insurance Companies, 89 U.S. 99 (1874) (giving effect to incorporation by the legislature of a state in armed rebellion against the United States):

M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933) (giving effect to Soviet confiscation of oil lands owned by Russian nationals and located in territory under the de facto control of the U.S.S.R.);

Banque de France v. Equitable Trust Co., 33 F.(2d) 202 (S.D. N.Y. 1929) (giving effect to Soviet confiscation of gold held within its territory for account of Banque de France by State Bank of Russian Empire).

The Denny, 127 F.(2d) 404 (C.C.A. 3, 1942) (giving effect to nationalization decrees of the unrecognized Lithuanian Socialist Soviet Government).

In the *Banque de France* case the court was particularly concerned with protecting the only American national involved from double liability. It held that the Soviet confiscation of gold within its own territory would be recognized, so that the American national could rely upon the title of the Soviet State Bank and was not subject to suit to recover the gold instituted by the Banque de France.

The effect of the decrees before the Court in *The Denny* was to nationalize certain Lithuanian associations. The court also recognized the authority of a certificate executed by a Lithuanian notary authenticating a power of attorney from two of the nationalized Lithuanian associations. The case was a dispute between Lithuanian citizens as to ownership of a vessel located in the United States at the time of the nationalization. While the same court later decided *The Maret*, supra, it did not overrule *The Denny*, but distinguished it. It emphasized the effect of the notary's authentication of the power of attorney running from the Lithuanian associations (145 F.(2d) at page 440, n. 38).

Such distinctions add to Appellee's confusion as to the effect of political recognition.

Also worthy of mention is *Russian Volunteer Fleet v. U. S.*, 282 U.S. 481, 51 S.Ct. 229 (1931). Appellant's attempt to distinguish this case as a claim against the United States (Opening Brief, pages 14-15) is an artificial one which gives Appellee little comfort. The fact remains that in spite of non-recognition of the U.S.S.R. by the United States, the Supreme Court recognized a claim of a Soviet corporation and the standing of that corporation to sue in the courts of the United States.

The Bank of China is a Chinese corporation. Movant asserts its claim through the corporate structure of the Bank of China. It is particularly on the issue of corporate authority that a hearing by the District Court should be had when sufficient evidence is available to determine that issue.

C. WHETHER APPELLEE WILL BE SUBJECTED TO A SECOND AND DOUBLE LIABILITY FOR THESE DEPOSITS.

Unless Movants are parties to this proceeding, and so barred from future action, they may later attempt to prove their corporate authority and to collect from Appellee for a second time.

Several cases raise grave doubts as to the authority of refugee directors to sue on the claim of a nationalized corporation or on the claim of a corporation with its domicile in occupied territory. If it can subsequently be shown that the suit by the refugee directors was unauthorized, there may be a second recovery against the stakeholder, where the rival claimants to corporate authority are not parties to the first proceeding.

In *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 147 N.E. 703 (1925), rearg't den. 148 N.E. 757, the court dismissed an action brought by emigré directors in the name of a Russian insurance corporation to recover money and securities deposited by the corporation with the Bankers Trust Company. The trust company held the money and securities as trustee to protect policy holders and creditors in the United States. Before the suit was begun the Russian corporation had been nationalized by decree of the unrecognized Soviet Government and had been prohibited from holding directors' and stockholders' meetings.

The Bankers Trust Co. claimed no interest in the money and securities except as trustee or depository. It resisted plaintiffs' claim on the ground that plaintiffs failed to establish ownership or right of possession to the exclusion of others who might demand the property thereafter, and on the ground that the corporation no longer existed, or

in the alternative, that those emigré directors who made the demand and authorized the suit no longer represented the corporation. It further urged that the court should not assume jurisdiction of the action, because a judgment would not bind other parties who were not before the court and who might thereafter be able to establish a valid claim.

In view of its doubts as to the continued existence of the corporation and as to the authority of those persons who had instituted the action to speak for the corporation, and because of the chance that defendant might be exposed to a second liability for the same funds, the court refused jurisdiction. The court stated that the corporation was deprived of no substantial right or benefit by its refusal to take jurisdiction

“* * * until the time comes when a government which we recognize rules the country of plaintiff’s corporate domicile, or at least until the plaintiff corporation is able to re-establish its existence in that domicile, and the machinery provided by its charter for the management of its affairs is again functioning.” (147 N.E. at 709.)

After recognition, the United States courts could pass on the justice of any Soviet claim based on confiscation.

This case has never been overruled, although Judge Cardozo attempted to distinguish it in the *Petrogradsky case*, supra. It is based on reasoning directly opposed to Cardozo’s reasoning in the *Petrogradsky case*, and adds to Appellee’s perplexities in its present dilemma. The *Petrogradsky* decision found that plaintiff’s corporate personality continued and that those who had instituted the suit had authority to act for the plaintiff corporation. The opin-

ion in the *Russian Reinsurance Company case*, on different facts, expressed doubts both as to the continued corporate existence of the plaintiff and as to the authority of those persons who had instituted the action. It found that the law of the corporation's domicile controlled on both of these issues, in spite of the fact that the territory of the domicile was under the control of an unrecognized government.

The record now before this Honorable Court raises real doubts as to corporate authority and the facts bear much similarity to those before the court in the *Russian Reinsurance case*.

Steingut v. Guaranty Trust Co., 161 F.2d 571 (C.C.A. 2, 1947), was decided after the United States Supreme Court had handed down its decisions in the *Guaranty Trust Co. case*, *supra*, and in *U. S. v. Pink*, *supra*; it passed on the right of the New York State Receiver of the Russo-Asiatic Bank to a demand deposit made by the Russo-Asiatic Bank before it was nationalized by the Soviet Government of Russia. The United States claimed the deposit as assignee of the Soviet Government under the Litvinov assignment. The case arose after recognition of the U.S.S.R. by the United States. In the course of its opinion the court stated that a 1918 demand made on the Guaranty Trust Co. by refugee directors of the Russo-Asiatic Bank was an ineffective demand. It did not start the running of interest in favor of the assignee of the Russian Government. This statement reflects doubt on the authority of refugee directors to sue in the name of a corporation domiciled in occupied territory.

D. LEGAL EFFECT OF DRASTIC CHANGES IN CHINA ON CONTINUED VALIDITY OF T. Y. LEE'S POWER OF ATTORNEY AND ON AUTHORITY OF REFUGEE DIRECTORS AND MANAGING OFFICERS OF THE BANK OF CHINA.

1. The institution of the present actions was authorized by T. Y. Lee and Hsi Te-Mou. T. Y. Lee's authority derives from his position as manager of the New York branch of the Bank of China and from a power of attorney from the Bank of China.

The court in *Andre v. Beha*, 211 App. Div. 380, 208 N.Y.S. 65, 81 (1925), expressed doubt as to the effect of a power of attorney given to a general manager of a Russian corporation before that corporation was nationalized by the Russian Government and before the Soviet Revolution. It stated that the power of attorney referred to powers at the time it was issued five years before and under different conditions, before dissolution of the corporation by the Soviet Government and confiscation of its property.

2. *Russian Reinsurance Co. v. Stoddard*, *supra*, recites facts very similar to those in the present record. The corporation was prevented from conducting its business at its corporate domicile. Its property had been sequestered and its business nationalized. No meetings of the stockholders had been held for some time. Meetings of directors had been held elsewhere than at the corporate seat, in spite of charter provisions as to the location of the corporate domicile. The directors were acting without the customary checks and limits furnished by shareholders' meetings and provided for in the corporate charter. The court expressed its doubts as to the continuance of the agency of the refugee

directors to act for the corporation and even as to the continued corporate existence of the plaintiff.

VI. An Appellate Court Should Not Disturb the Wide Discretion of a Trial Judge in Granting and Refusing Continuances.

When and if appellant feels it can satisfactorily prove its case, its remedy is to ask the District Court to set the case for trial. A trial judge has a wide discretion to control the time of hearing a case and to postpone a trial on the merits where the question and the just rights of the parties require postponement. A judge may grant a continuance on his own motion.

In re Howard, 130 F.2d 534 (C.C.A. 5, 1942);
7 Cyc. Fed. Proc. 352.

Only if the refusal of the trial court is arbitrary or if the continuance is unreasonably long can appellant seek the aid of this court. Even then its remedy is by way of a petition for a writ of mandate and not by appeal.

Bedgisoff v. Cushman, 12 F.2d 667 (C.C.A. 9, 1926).

CONCLUSION

As is evident from the content of this brief, Appellee Wells Fargo Bank is not personally interested in the fund heretofore deposited with it and now in the registry of the court. It is, however, interested that the fund be paid to the proper person and that it be released of liability to any other person upon such payment. It is, of course, also interested that it not suffer any penalty of interest under the circumstances of this case where it acted promptly and in good faith in an effort to have determined the true owner-

ship of the fund. Any delays which occurred were caused by others than the Appellee bank.

As previously stated, Appellee believes that the District Court is the proper tribunal to determine ownership of the fund, and therefore that the judgment in this matter should be affirmed and Appellant left to its remedies before that Court.

Respectfully submitted,

LLOYD W. DINKELSPIEL

MARTIN MINNEY, JR.

EDWARD W. ROSSTON

HELLER, EHRLMAN, WHITE &
MCAULIFFE

*Attorneys for Appellee
Wells Fargo Bank &
Union Trust Co.*

Nos. 12,698 and 12,699

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF CHINA (a corporation),
Appellant,

vs.

WELLS FARGO BANK & UNION TRUST
Co. (a banking corporation),
Appellee.

No. 12,698

BANK OF CHINA (a corporation),
Appellant,

vs.

WELLS FARGO BANK & UNION TRUST
Co. (a banking corporation),
Appellee.

No. 12,699

MOVANT-APPELLEE'S BRIEF.

ROBERT W. KENNY,
250 North Hope Street, Los Angeles, California,
MARTIN POPPER,
WOLF, POPPER, ROSS & WOLF,
160 Broadway, New York, New York,
BENJAMIN DREYFUS,
FRANCIS J. McTERNAN, JR.,
57 Post Street, San Francisco 4, California,
Attorneys for Movant-Appellee
Bank of China.

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PAUL A. O'BRIEN,

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II.

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The sole issue before the District Court was the authority of appellant or movant-appellee to represent the Bank of China, a private corporation, in the action against Wells Fargo. This was a judicial question to be decided on the facts and applicable legal principles. The issue did not involve the political questions of recognition or non-recognition	37
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Nos. 12,698 and 12,699

IN THE
United States Court of Appeals
For the Ninth Circuit

BANK OF CHINA (a corporation),
Appellant,

vs.

WELLS FARGO BANK & UNION TRUST
Co. (a banking corporation),
Appellee.

No. 12,698

BANK OF CHINA (a corporation),
Appellant,

vs.

WELLS FARGO BANK & UNION TRUST
Co. (a banking corporation),
Appellee.

No. 12,699

MOVANT-APPELLEE'S BRIEF.

STATEMENT OF JURISDICTION.

The statement of jurisdiction presented by appellant is controverted. Heretofore, the movant-appellee moved to dismiss these appeals upon the ground that this Court was without jurisdiction to review the order of the District Court. On October 17, 1950, this Court denied the motions "without prejudice to

their renewal upon the hearing of the causes on the merits." A detailed discussion of the jurisdictional question is contained in the brief herein (pp. 23-36).

STATEMENT OF THE CASE.

Appellant's statement of the case is also controverted. The appellant's brief disregards entirely the findings contained in the opinion of the District Court below (R. 96-106); it overlooks the testimony and exhibits contained in the record which militate against its position, some of which were presented by the appellant itself (R. 155-176, 181-184, 186-197, 232-244, 264-266, 274-284, 286-292); it disregards the limited nature of the issue before the District Court and the real parties involved in controversy therein; and it characterizes unfairly, it is respectfully submitted, the action taken by the District Court (App. Br. p. 10).

The attempt of the appellant to "rush" this case to judgment (App. Br. pp. 26-28), sharply rejected by the District Court below (R. 375), lends support to the view that appellant is unwilling to recognize any power in the courts to exercise their judicial functions and apply the law as justice in the particular case may require. It is submitted that a court of law, as the District Court held, consistent with its constitutional commission, must function in a manner separate and different from that of another department of government; that courts cannot simply become instruments of executive policy as the appel-

lant would appear to urge; and that, consistent with grants of authority contained in the Constitution and statutes, courts of law must consider the private rights and obligations of individuals wherever issues are appropriately presented for decision. The appellant's brief injects totally irrelevant and misleading issues and uses volatile nomenclature which it readily admitted in the court below, when pressed, "has nothing to do with it, and I make no pretense it has." (R. 356.) This makes necessary, therefore, a separate statement of the case by the movant-appellee.

THE FACTS.

On November 9, 1949, there was instituted in the United States District Court for the Northern District of California, Southern Division, a suit on behalf of the Bank of China, an alien corporation, "citizen, resident and inhabitant of the Republic of China" (R. 3) against the Wells Fargo Bank & Union Trust Co., a banking corporation, organized under the laws of the State of California (R. 3-5). The suit was for a sum of money, \$626,860.07, alleged to have been deposited with Wells Fargo, repayment of which had been allegedly demanded and refused.¹

The answer of Wells Fargo (R. 5-10) was filed on December 5, 1949 (R. 10). It alleged, among

¹A similar suit for an additional sum of \$174,224.57 was instituted on April 26, 1950 (No. 12699, R. 3-5). No motion for summary judgment was made in this second suit. The issues are the same in both cases. Reference, unless otherwise indicated, will be solely to the record in No. 12698.

other things, that some time prior to October 11, 1949, an account was opened in the name of "Bank of China, Shanghai" (R. 7); that it had been furnished at that time and subsequently with facsimiles of signatures of persons authorized to draw on said account; that on June 27, 1949, and October 10, 1949, the defendant Wells Fargo received cabled instructions from Shanghai, China, signed "Bank of China, Shanghai, China," to the effect that former specimen signatures should be considered null and void and that no payments should be made from the account except upon orders received from Bank of China, Shanghai, China (R. 7-8).

The answer further alleged that on October 7, 1949, and thereafter, "certain individuals purporting to represent the Bank of China, residing in Hongkong and in New York City" (R. 9), made demand for payment of the sum of \$626,860.07 in the name of the Bank of China; that Wells Fargo had been furnished with no written evidence from the Board of Directors of the Bank of China relative to the authority of those who purported to exercise dominion and control over the account (R. 9); and that in view of the conflicting claims, Wells Fargo was unable to ascertain to whom the funds might legally be paid (R. 9).

MOTION FOR SUMMARY JUDGMENT.

On December 9, 1949, the parties and their counsel who had instituted the suit moved for summary judgment (R. 11-12). For the first time, the purported

authority of those who had acted in behalf of the Bank of China was revealed.

The affidavit of H. H. Kung (R. 13-15), verified November 28, 1949, stated that "he is now sojourning in the City and State of New York" (R. 13); that for the past five years he had been a Managing Director of the Bank of China; that he was Minister of Finance of the National government of the Republic of China in March, 1936; that he had at that time executed his certificate as to the Articles of Association of the Bank of China; that the plaintiff in this action is the same Bank of China whose Articles of Association he certified in 1936; that "there has been no change or amendment in the said Articles of Association from March 2, 1936, to the date of this affidavit" (R. 14). Nothing was stated in the Kung affidavit (although he described himself as a "Managing Director") relative to the authority of those who made the demand on Wells Fargo or who instituted the action on behalf of Bank of China.

Another affidavit, verified March 30, 1950, was submitted by one Hsi Te-Mou (R. 34-36). Te-Mou averred that he had been General Manager and Managing Director of Bank of China since May 6, 1948; that the Bank was organized in 1912 and that the Articles of Association submitted by Kung were "true and correct"; that as General Manager "there has been under his control and supervision" the books, records and accounts of the corporation (R. 35); that the sum of \$626,860.07 had been deposited with Wells Fargo, and said corporation "has heretofore demanded repayment of the said sum" (R. 35).

Te-Mou also affirmed that in December, 1946, the Board of Directors at a meeting in Shanghai, China, executed a power of attorney to one Tuh-Yueh Lee "to represent this corporation in the United States of America" (R. 35); that prior to April 29, 1949, the principal place of business of the Bank of China "was regularly and lawfully" removed from Shanghai, China, to Canton, China, and thereafter was removed to and "is now located at Chungking, China" (R. 36); that since the removal of the principal office from Shanghai, no agent or representative in said city was authorized to issue any order whatever affecting the Wells Fargo account; that no such order was or could have been issued by said Bank of China from any source in the City of Shanghai (R. 36). The Te-Mou affidavit was also devoid of any indication as to who had authorized the demand upon Wells Fargo or the institution of the suit.

The third affidavit was by Tuh-Yueh Lee, verified March 30, 1950 (R. 56-57). Lee described himself as "Manager of the New York Agency of the Bank of China," with offices located in New York. He affirmed that the power of attorney which had been executed in 1946 had never been revoked, and that "acting under the authority contained in said power of attorney," he had directed the action to be brought "by and in the name of said Bank of China" (R. 56-57). There was again no indication in Lee's affidavit as to who had been responsible for the original demand made upon Wells Fargo. It was also clear, so far as the institution of the suit was concerned, that Lee had acted solely on the basis of his 1946

power of attorney (R. 37-54). There was no evidence of any resolution or vote of the directors or shareholders of the Bank either with respect to making a demand upon Wells Fargo or the institution of any suits on its behalf.

The affidavits of the Wells Fargo Bank, in opposition, included the sworn statement of W. J. Gilstrap, its Vice President. It was then affirmed that on June 27, 1949, Wells Fargo received a cable from Shanghai, China "in the said test key" and signed "Bank of China, Shanghai, China," advising Wells Fargo that with the liberation of Shanghai, the Bank of China was taken over by the Shanghai Military Control Commission and that "the powers vested in its original Board of Directors are now temporarily vested in the East China Financial and Economic Affairs Administration." Officers who escaped to Hongkong and elsewhere had been dismissed, and "all communications from them are unauthorized" (R. 67). On June 30, 1949, a second cable from Bank of China, Shanghai, China, advised Wells Fargo that "Bank of China, Foreign Department, Hongkong is illegal" and that Wells Fargo would be held responsible for all unauthorized payments (R. 68). On July 22, 1949, Wells Fargo was again advised from Shanghai that Kungyingping had been appointed General Manager of the Bank of China, Head Office, and Chichaoting, First Assistant General Manager and Manager of Foreign Department and all branch offices (R. 68). On October 11, 1949, Bank of China again cabled Wells Fargo that the Central Peoples Government of Peoples Republic of China had been

established October 1, that payments of Bank of China accounts on any order except Bank of China, Shanghai, China, were to be immediately suspended (R. 69).

The affidavit further stated that throughout the period covered by the aforesaid cablegrams, Wells Fargo was receiving telegrams and letters from persons purporting to represent "Bank of China, New York," "Bank of China, Hongkong," and "Bank of China, Canton," attempting to exercise control over the deposit; that the Articles of Association of the Bank of China provided for only one Head Office in Shanghai (R. 70); that no evidence of any meeting of shareholders or board of directors authorizing the removal of the Head Office had ever been received.

F. J. Hellman, another Vice President of Wells Fargo, affirmed that after receipt of the cable of June 27, 1949, from Bank of China, Shanghai, he had caused a cable to be sent to one R. C. Chen, suggesting transfer of the account to an account reading "Bank of China, Foreign Department, Hongkong," but that he had made the suggestion without consulting legal counsel, the Articles or by-laws of the Bank of China, and without regard to the legal effect of the cable received on June 27, 1949 (R. 75).

On December 19, 1949, the motion for summary judgment came on for argument before the Honorable Louis E. Goodman, a Judge of the United States District Court (R. 327-336). Counsel for appellant stated that "we are quite content to submit the question of authority on the basis of the affidavits before

your Honor here today'' (R. 328). Counsel for Wells Fargo asserted that ``* * * the Bank of China has only half of its shares, I understand, owned by the Government of China, the other half are in private hands. There are twenty-one directors of the Bank of China of which in addition to that seven managing directors of whom we have heard from two; Dr. Kung, at one time Minister of Finance, who has fled the country, and two or three others who are no longer in the country—and we dispute the fact that these people are in effect the Bank of China'' (R. 330).

The Court reserved its ruling on the motion for summary judgment and the case was set for trial on December 29, 1949 (R. 335). Subsequently the trial was reset for February 1, 1950 (R. 99).

THE APPELLANT'S DEPOSITIONS.

The depositions taken by appellant of its own witnesses in preparation for trial, with only Wells Fargo appearing in opposition, are of great significance. The testimony of appellant's own witnesses demonstrated unequivocally that the Bank of China was a private corporation; that the demand made upon Wells Fargo for a deposit of close to three quarters of a million dollars was never authorized by the Bank of China; that similarly the institution of the present suit had never been authorized by the Bank of China; that the affidavits submitted in support of the motion for summary judgment were not in accordance with

the essential facts; that in truth, as the District Court found, the demand and suit had been initiated by some "emigre directors" who could no longer speak for the Bank of China, to which Bank "the funds here in controversy belong" (R. 102).

The deposition of H. H. Kung was taken on January 16, 1950 (R. 154-185). Kung testified that the Bank of China was a commercial bank (R. 155); no decree had ever terminated the existence of the Bank (R. 158). Dr. Kung had been in the United States since 1944, at which time he resigned as Minister of Finance (R. 160). Before 1935, the shares of the Bank were held entirely by private shareholders (R. 162); after 1935, the capital of the Bank was increased—"the government owned 200,000 shares and the public owned 200,000 shares" (R. 164).

"Q. Do you know where those share are held or generally by whom?

A. By five thousand different individuals." (R. 165.)

The witness testified further that the shareholders elect the board of directors, who in turn elect the managing directors, from whom the government appoints a chairman (R. 168). The government as shareholder elects nine directors and three supervisors; the remaining twelve directors and four supervisors are elected at a general meeting of shareholders (R. 168). Dr. Kung stated that there had been no meetings of the corporation for the election of directors and no meetings of the directors and no appointment of a chairman since March, 1948

(R. 170). "The shareholders were spread all over" (R. 170). The Articles of Association were never amended to change the Head Office of the Bank from Shanghai, China (R. 171). The funds on deposit with Wells Fargo were not government funds; they were funds belonging to the Bank of China (R. 173-174). Dr. Kung had not authorized the institution of the suit (R. 176). Of the Board of Directors which had last met in March, 1948 (R. 170), the chairman and seven others were in 1950 residing in Hongkong, six were in Formosa, six were in New York, one in California, one in Shanghai, China, one in Hangchow, China, and the residence of two others was listed as "unknown" (R. 183). Since the resignation of Dr. Kung as Minister of Finance in 1944, six other persons had served in the same capacity for varying periods of time (R. 182).

Hsi Te-Mou testified (R. 186-244) that in May, 1948 he was appointed general manager of the Bank (R. 187); that the Bank of China was organized in 1912 when China became a Republic (R. 187). The witness thought that the Board of Directors should meet in Formosa, "but I don't think they could get a quorum" (R. 236). He thought a meeting had perhaps taken place in Hongkong, "in August, maybe (1949)" (R. 237), but he didn't know the date and would consult a Mr. Yoo (R. 237). Dr. Kung was right in saying that the last shareholders' meeting was in March, 1948 (R. 237). While some "high officers" of the Bank had left Shanghai, some of the directors of the Bank, "assistant chiefs and so on" had remained (R. 239).

As to Mr. Lee's authority to institute a suit on behalf of the Bank of China pursuant to his 1946 power of attorney, the witness was positive that Lee had no authority to make a demand or institute any action without instructions (R. 242). While the witness had stated in his sworn affidavit that the books, records and accounts of the Bank of China were "under his control and supervision" (R. 35), he now stated that some of the books were in Formosa, "possibly some in Shanghai" (R. 243).

Y. Y. Lee testified (R. 245-266) that he was the manager of the New York agency of the Bank of China, to which position he had been transferred in 1946 (R. 245). He had directed the institution of the suit, having "talked" with Mr. Hsi and Dr. Kung before it was started (R. 263). They expressed their approval of the commencement of the litigation (R. 264). Lee stated that if he opens an account for the New York agency with some bank, then he can draw on it, but if the head office opens an account with another bank, he cannot draw on it unless he is instructed to do so (R. 266).

Hsi Te-Mou returned to testify (R. 268-292) and submitted a circular letter addressed to correspondent banks dated May 16, 1949, from the Bank of China, "head office at Canton," informing the recipients that "our Foreign Department has been transferred to Hongkong" (R. 270-272). Of the list of directors which he submitted, he stated it was possible that some of the people listed may have resigned (R. 281). He now stated that most of the corporate

books are in Shanghai (R. 283-284). He was certain that none of the funds deposited with Wells Fargo were public funds of the government deposited abroad (R. 284). “* * * the Bank of China is a commercial bank and its deposits with Wells Fargo are private deposits, so far as that is concerned” (R. 284). The witness also stated, after checking, that he was unable to state whether some of the Board of Directors had resigned or gone over to the People’s Government, “because some of them are in Shanghai and we are out of touch now with Shanghai” (R. 289).

THE MOVANT BANK.

On January 26, 1950, a group of attorneys, Robert W. Kenny, of Los Angeles; Martin Popper and Wolf, Popper, Ross and Wolf, of New York City; Benjamin Dreyfus and Francis J. McTernan, Jr., of San Francisco, moved in the District Court for an order either dismissing the action or, in the alternative, for a substitution of attorneys in place and stead of those attorneys who had instituted the suit) upon the grounds that the individuals purporting to act on behalf of the Bank of China acted unlawfully and without authority; and that a hearing be directed on the issues of law and fact raised by the motion pursuant to Rule 43(e), Federal Rules of Civil Procedure (R. 75-77).²

²The appellant does not here contest the procedure adopted by movant appellee. The question raised by the motion in the District Court was the authority of those who instituted the action on behalf of the Bank of China. It was the claim of the movant-appellee

In support of the motion, movant-appellee submitted the affidavits of Frederick V. Field, verified the 23rd day of January, 1950 (R. 77-79) and the affidavit of Martin Popper, verified the 25th day of January, 1950 (R. 80-94). Field averred that he was a citizen of the United States and President of the American-Chinese Export Corporation, a New York corporation; that the American-Chinese Export Corporation had for some time been actively engaged in trade and commerce with China, and was in the regular conduct of its business in frequent communication with leading commercial, industrial and banking institutions in China (R. 78). Field was first informed of the pendency of the action on December 19, 1949, and communicated this information to the Head Office, Bank of China two days later (R. 78).

On December 24, 1949, Field received a cablegram from Peking, China (R. 80) signed on behalf of the Head Office, Bank of China, by its General Manager and two Assistant Managers, appointing Field as attorney-in-fact to represent the interest of the Bank of China in the pending lawsuit (R. 78). All previous powers of attorney were revoked. The Assistant Man-

that the action was unauthorized, legally "spurious", and that the only authorized agent of the Bank of China were the movant-appellee, who sought substitution or a dismissal of the action against Wells Fargo. The District Court had inherent power to inquire into the authority of those who initiated the action, and the procedure adopted to call this matter to the Court's attention was appropriate. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 47 S. Ct. 361; *King of Spain v. Oliver*, 2 Wash. C.C. 429, Fed. Cas. No. 7814; *National Lock Co. v. Thompson*, 86 F. (2d) 484 (C.C.A. 7th, 1936); *Alamo v. Del Rosano*, 98 F. (2d) 328 (App. D.C., 1938); *In re Retail Chemists Corporation*, 66 F. (2d) 605 (C.C.A. 2nd, 1933); *Sutherland v. International Ins. Co.*, 43 F. (2d) 969 (C.C.A. 2nd, 1930); *Friedman v. Harris*, 158 F. (2d) 187 (App. D.C. 1946).

ager who sent the cablegram was well known to Field (R. 79). Upon receipt of the cable and pursuant to his authority as attorney-in-fact, Field retained the law firm of Wolf, Popper, Ross & Wolf as counsel to represent the interest of the Bank of China (R. 78).

Martin Popper affirmed that he was an attorney at law and a member of the firm of Wolf, Popper, Ross and Wolf, attorneys of New York City (R. 80). In addition to the retention of the firm by Frederick Field, a separate communication was received by the law firm on December 24, 1949, authorizing the firm to act as lawyers for the Bank of China in the case against Wells Fargo Bank (R. 81, 89); the communication was signed by the General Manager and Assistant Manager of the Head Office. Pursuant to the authority vested in the law firm, associate counsel in San Francisco and Los Angeles were retained, and the aforesaid counsel were the only attorneys authorized to act for or to represent the Bank of China in any matters affecting the funds in the possession of Wells Fargo (R. 82).

The affidavit of Martin Popper further asserted that diligent investigation revealed that the action instituted on behalf of Bank of China had been without authority and against the expressed wishes of the management of said Bank of China (R. 82); that no justiciable case or controversy was therefore presented (R. 83); that a judgment rendered under such circumstances would be entirely void and without effect.

In support of the application for an order either dismissing the action or substituting the moving parties, and for a hearing, the following facts were set forth in the morning papers:

(1) On December 24, 1949, Frederick V. Field was appointed attorney-in-fact by the Head Office, Bank of China, and all previous powers of attorney were revoked (R. 84); (2) On December 24, 1949, Field retained the law firm of Wolf, Ross, Popper and Wolf, and on the same day the law firm received a direct communication from the Head Office, Bank of China authorizing the firm to act as lawyers for the Bank in the action against Wells Fargo; (3) On January 11, 1950, counsel was informed by cable (R. 90) that two thirds of the stock of the Bank of China is owned by the new government of the People's Republic of China, private stockholders' interests have remained unaffected by any law or decree save for a small amount belonging to war criminals; under the Charter of 1944, Board of Directors consisted of 13 government-appointed directors and 12 elected by private stockholders; the present General Manager and Assistant General Manager had replaced officers who fled to Hongkong and had been dismissed; all other officers in charge of the various business departments of the Bank of China remained in their original posts and were unaffected by political changes in China; (4) On January 16, 1950, another communication from the Bank of China (R. 91) stated that Kung was replaced as Chairman of the Board of Directors in April, 1948, long before recent

political changes, and a circular letter of June 1, 1948, cancelled Kung's specimen signature. Under the by-laws of the Bank, neither Kung nor the head of the foreign department of the Bank of China had authority to bring a lawsuit in its name (R. 85); (5) On January 22, 1950, another communication (R. 92) was received stating that the 1935 charter under which Kung and the others purported to act was amended in material respects in 1944; that the 1944 Charter was still in force, and pursuant to the Charter the number of directors and proportions of stock ownership had been modified as set forth in previous cables; that at least two directors elected by the stockholders' meeting of April, 1948, were still acting in that capacity within China and others had left under duress and expressed a desire to return; that new government-appointed directors had been named and were acting as such (R. 85). Another cable dated January 30, 1950 (R. 93) stated that the East China Financial and Economic Affairs Administration temporarily exercised Board authority after the liberation of Shanghai. The East China Administration announced December 24, 1949, the convening of a new directors' meeting, "upon arrival Peking directors elected by private stockholders" (R. 94).

The affidavit of counsel further affirmed that "the question as presented here is not one of a claim advanced by or on behalf of a foreign government. No question of nationalization, confiscation or expropriation is involved here. The Bank of China is in existence. * * * The sole question relates to the authority

of the individuals who initiated this action, and the authority of the attorneys who acted for them" (R. 88). Counsel for the movant averred that the action on behalf of the Bank of China was wholly unauthorized and unlawful, and that the Court had before it an action upon which no judgment could lawfully be based (R. 88).

THE OPINION OF THE DISTRICT COURT.

The decision of the District Court (R. 96-106) was rendered on July 17, 1950 (R. 106). The Court recognized that the facts which had been presented by Wells Fargo and the movant-appellee were virtually uncontroverted (R. 96-100). It pointed out that "the attorneys for the emigre directors countered these allegations of fact with the assertion that the Nationalist Government now operating from Formosa is the only government of China recognized by the United States" (R. 100). The District Court found, however, that the Bank of China "is not a public corporation nor are its funds government funds" (R. 102). The corporation is engaged in a general banking business. It operates through 200 branches throughout China. "The Bank of China cannot perform its functions while divorced from the Chinese nation. Its depositors, its 5,000 private stockholders, and the Chinese people—who may be characterized as the ultimate owners of the government stockholdings—must live under the government which in fact governs throughout the territorial limits of China" (R. 103). On the other hand, the District Court

found that the emigre directors of the Bank were scattered, the whereabouts of some unknown; some of them represent a government which cannot speak for the Chinese people in respect to the manner in which the corporation shall function in China; and others may not be the directors whom the private stockholders now desire to speak for them (R. 103).

Citing numerous precedents (R. 102), the District Court recognized the well-established judicial principle that the existence of a de facto government in control of its territory and nationals cannot be ignored; that a corporation existing in fact in a territory controlled by a de facto government was entitled to be managed and represented by agents of its own choosing; that if such corporation revoked the authority of prior agents or dismissed previous officers, there was no power in a court of law to disregard those uncontroverted facts, and to enter judgment against an American national on the basis of a patently unauthorized demand of lawsuit (R. 101-102).

The District Court recognized that the argument of the emigre directors that they were entitled to the funds because the government in Formosa was the only recognized government of China was clearly wrong. "For these are corporate funds which should not be dissipated for purposes other than those of the corporation" (R. 103). On the other hand, the District Court believed that if the Bank of China were to receive its funds on deposit with Wells Fargo, "the 'People's Government' would be aided and abetted" (R. 105).

Accordingly, movant-appellee's motion for dismissal or substitution was denied without prejudice (R. 106); appellant's motion for summary judgment was also denied (R. 106); trial of the cause was continued without date certain and Wells Fargo given leave to deposit the funds in the registry of the Court (R. 105-106).

THE ORDER OF THE DISTRICT COURT.

The aforesaid recital of facts would appear to make clear, it is respectfully submitted, contrary to the suggestion of the appellant here, that the decision of the District Court to continue the trial of the cause was far more beneficial to the appellant than to any of the other parties. Apart from the legal issue raised by appellant concerning the effect of recognition or non-recognition upon the lawsuit (its sole reliance to sustain the action), *the facts* demonstrated that there is only one Bank of China in existence today; that the bank is a private corporation; that movant-appellee are its only authorized agents; that the demand and action against Wells Fargo were wholly unauthorized; and that if the cause proceeded to full hearing, the application of the movant-appellee would, on the facts, be required to be granted by the District Court. The movant-appellee has not appealed from the order of the District Court because it believes that the order is not appealable; that, as the movant-appellee informed the District Court, its sole desire is to protect the stockholders and depositors of the Bank of China. The Bank has made no

demand upon Wells Fargo for the funds and does not question that Wells Fargo is a sound repository; the sole aim of movant-appellee is to preserve the funds for the corporation and to prevent their dissipation by those to whom the funds do not belong through the misuse of the law.

The order of the District Court (R. 106-110) did no more than preserve the status quo. The trial of the cause is continued without date, but there is no restraint upon any of the parties, upon good cause shown, to bring the cause on for trial. The only American national involved in the proceeding is Wells Fargo, the stakeholder. The District Court appears to have determined that Wells Fargo should not be penalized in any manner because of the dispute between the two groups who claim to represent the Bank of China. It has directed Wells Fargo to deposit the funds in the Registry of the Court, and relieved it of any further liability. The loss of any further interest must be borne by the alien corporation. The funds themselves are secure. In the meantime, all of the parties must abide the events "before the judicial function may be properly exercised" (R. 105). It is respectfully submitted that all of this presents nothing upon which the appellant can predicate legal injury.

SUMMARY OF ARGUMENT.

The Bank of China is a private corporation which has existed in China for almost 40 years and which still functions and has functioned uninterruptedly

for that period on the Chinese mainland as a commercial banking institution. Its stockholders are some 5,000 private individuals and the Chinese Government. The dispute herein grows out of a change in the Government of China and is one between two groups of Chinese nationals in which each group asserts authority to act for the corporation.

The change in the actual Chinese Government is a matter of fact which was established in the Court below. The political question of whether the Government of the United States has recognized that change diplomatically has no bearing on the issue of authority to act for this corporation.

The showing made by movant, Bank of China, established, and it was in fact conceded, in the District Court that the Central Peoples Republic of China is the actually existing—the *de facto*—government of China. It was also established conclusively that the authority of that group of Chinese nationals who caused the institution of this action had long been repudiated and revoked (if indeed it ever existed to the degree asserted by appellant) by the governing officials of the Bank of China.

Appellant ignores the only issue before the Court and ignores the uncontrovertible facts established in the District Court by movant. The parties before this Court are not governments, recognized or unrecognized. The issue before the Court is not one between governments or purported governments. The issue is a judicial one and not a political one. And upon the judicially established principles of international law

the Court must recognize the claim of movant, Bank of China, based as it is upon the acts and transactions of a private corporation existing under the de facto government of China.

Upon these principles, movant, Bank of China, was entitled to the relief it sought below. However, the decision below was not a final one nor an appealable interlocutory one. This Court therefore has no jurisdiction in the cause and the purported appeal should be dismissed. In the alternative, since the decision below merely preserved the status quo, it should be affirmed.

I.

THIS COURT HAS NO JURISDICTION OF THE PURPORTED APPEAL.

After the filing of the notices of appeal and the certification of the record to this Court, movant-appellee moved to dismiss these appeals upon the ground that this Court is without jurisdiction. On October 17, 1950, the Court denied said motions "without prejudice to their renewal upon the hearing of the causes on the merits." Movant-appellee hereby renews said motions.

Appellant asserts that this Court has jurisdiction of the purported appeals herein by virtue of 28 U. S. C. §1291, §1292 and §1294 (1), upon the theory that the orders of the Court below amount to final decisions and injunctions (App. Br. p. 3).

In no sense are the orders made by Judge Goodman final (28 U.S.C. §1291) and in no sense can they be considered the grant of an injunction (28 U.S.C. §1292).³

The orders,⁴ which are substantially identical, provide as follows:

1. The trial of cause was continued *sine die*.
2. The motion for summary judgment was denied without prejudice.⁵
3. The motion to dismiss or in the alternative to substitute attorneys was denied without prejudice.
4. The defendant, Wells Fargo Bank & Union Trust Co., was permitted to (and did) deposit the funds involved in the Registry of the Court, pending a decision on the merits.
5. Upon deposit of the funds in the Registry of the Court, said defendant was relieved of all demands for interest for use of the funds.
6. Upon deposit of the funds in the Registry of the Court, the said defendant was discharged from all liability for the funds and the plaintiff, anyone claiming through the plaintiff, and all persons before the Court were restrained from attempting to enforce any claim against said defendant.
7. Said defendant's right to assert a claim for attorneys' fees against the fund was reserved.

³28 U.S.C. §1294(1) merely designated the proper Court of Appeal to which an appeal lies from the District Court.

⁴R. No. 12698, p. 106; R. No. 12699, p. 26. The Orders will henceforth be referred to in the singular.

⁵No motion for summary judgment was made in No. 12699.

8. All counsel who had appeared in the proceedings were to receive notice of all subsequent proceedings.

A. THE ORDER IS NOT A FINAL DECISION.

The appellate jurisdiction of this Court can be invoked under 28 U.S.C. §1291 only where there has been a final decision of the District Court. The problem is the degree of finality required to bring appellate jurisdiction into being.

It is clear from the cases that in order to be final for purposes of appeal, the decision must be final in nature and complete as to all the parties and the whole subject matter of the action, must dispose of the entire controversy between the parties, terminate the litigation on its merits, and be a complete disposition of the cause, *Collins v. Miller*, 252 U.S. 364, 64 L. Ed. 616 (1920), *Arnold v. United States*, 263 U.S. 427, 68 L. Ed. 371 (1923), *Hunt v. United States*, 53 Fed. (2d) 333 (10th Cir., 1931), *Western Contracting Corporation v. National Surety Co.*, 163 Fed. (2d) 456 (4th Cir., 1947), *Asher v. Rupp*, 173 Fed. (2d) 10 (7th Cir., 1949), *Balboa Shipping Co. v. Standard Fruit & Steamship Co.*, 181 Fed. (2d) 109 (2nd Cir., 1950), and so long as the matter remains "open, unfinished or inconclusive there may be no intrusion by appeal." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528, 1536 (1949).

Upon these well-established standards, the order herein cannot muster that degree of finality which is essential to the jurisdiction of the Court.

1. There was no determination of the controversy by the Court below.

Taken as a whole, the order of the Court below did nothing more than postpone decision on the conflicting claims of appellant and movant. The Court studiously avoided making any decision on the merits. Its sole concern was to protect the *res* so that its final decision, when made, would be meaningful. The whole tenor of the order demonstrates conclusively its lack of finality. Motions for summary judgment and to dismiss were denied without prejudice. The deposit of the funds in the Registry of the Court was "*subject to further order of the Court pending a decision on the merits.*" (Emphasis added.) (R. No. 12,698, p. 108; R. No. 12,699, p. 28). The right to make later application for attorneys' fees was reserved to the defendant bank. Provision was made for notice to counsel of subsequent proceedings in the matter. The trial of the cause on the merits was continued for a later time. In other words, final decision was postponed and steps were taken to protect the jurisdiction of the Court in the interim. The rights of the conflicting claimants were not determined.

Appellant picks certain aspects of the order to which it appends the adjective "final" and thereby attempts to create a misleading impression of finality which, in fact, does not exist. For instance, it states that the appeals are from an order purporting finally to discharge appellant's claims against appellee (App. Br. p. 26). Appellant's statement is misleading in so far as it attempts to create the im-

pression that appellant's *claim to the funds* was finally denied. The Court below merely denied, without prejudice, appellant's motion for summary judgment. No order or judgment denying appellant's claim was made.

Again appellant claims error in the Court's "purporting finally to discharge Wells Fargo from all liability to the Bank of China" (App. Br. p. 8). True it is that Wells Fargo was relieved of liability, but it made no claim to the fund and took the position of a stakeholder. It was relieved of liability only after it deposited the sum claimed by appellant and movant in the Registry of the Court where it would be readily available to the successful claimant. Appellant's formal claim was against Wells Fargo, but its primary purpose in commencing the actions herein was not to fix a liability on Wells Fargo, but to obtain a sum of money which it claimed as its own. Wells Fargo has been discharged from liability, but appellant has not lost its claim to the fund. That claim has not yet been determined. The Court below has not finally acted on that matter which, actually, is the subject matter of the action.

In *Hunter v. Federal Life Ins. Co.*, 103 Fed. (2d) 192 (8th Cir., 1939), the Court entered a decree relieving the stakeholder of liability upon deposit of the funds in the Registry of the Court. The decree also distributed a portion of the funds, but retained the balance in the Registry of the Court subject to its further orders upon receiving proper proof of claims to the balance for which purpose it retained jurisdiction. The appellate Court held that it was

without jurisdiction, until the entire controversy had been determined. Similarly, the discharge of Wells Fargo's liability did not determine the controversy before the Court below. That controversy cannot be determined until ownership of the funds which had been in Wells Fargo's hands had been determined. Until that determination is made, there will be no final decision in this case.

2. The denial of interest is not a final decision.

On the matter of interest, appellant particularly stresses the alleged finality of the District Court's order. It is true that the order relieves Wells Fargo from the payment of interest for the use of the funds which are the subject matter of this action, upon the performance of certain conditions (which have been performed) by Wells Fargo. The only theory upon which the order denying interest could be held final and appealable is to place this case in the narrow exception to the general rule of finality, which permits appeal from adjudications, final in nature, of matters distinct from the general subject matter of the litigation (*Collins v. Miller, supra; Cohen v. Beneficial Industrial Loan Corp., supra*).

However, this provision of the order (Par. 5 of Order, R. 12,698, pp. 107-08; Par. 4 of Order, R. 12,699, p. 28) is but a step toward final judgment with which it will merge when a judgment is eventually entered after a final decision (See *Cohen v. Beneficial Industrial Loan Corp., supra*). It cannot be said that the claim for interest is a claim of right separable from, and collateral to, the basic claims

of right to the fund within the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, *supra*. Nor is the claim for interest so independent of the cause itself and so important that appellate jurisdiction cannot and should not be deferred as was the order appealed from in the *Cohen* case.

Appellant's claim for interest is merely an incident of its claim for the funds previously deposited with Wells Fargo (see cases cited App. Br. p. 11). It can have no right to interest until it is finally determined that it is entitled to the funds. Its claim for interest, therefore, cannot be independent or distinct from the general subject matter of the litigation in these cases. A denial of that claim cannot make this order, otherwise interlocutory, final and appealable.

3. The other provisions of the order are not final.

Other provisions of the order are clearly interlocutory and the authorities denying appealability are legion.

(a) The denial of summary judgment without prejudice.

The order in No. 12,698 denied without prejudice appellant's motion for summary judgment. Orders denying motion for summary judgment have never been held final for purposes of appeal. *Marcus Breier Sons, Inc. v. Marvlo Fabrics, Inc.*, 173 Fed. (2d) 29 (2nd Cir., 1949), *Jones v. St. Paul Fire & Marine Ins. Co.*, 108 Fed. (2d) 123 (5th Cir., 1939), *In re Finkelstein*, 102 Fed. (2d) 688 (2nd Cir., 1939).

(b) The denial of the motion to dismiss or to substitute attorneys.

The order denied, without prejudice, movant-appellee's motion to dismiss the action or in the alternative to substitute attorneys. Orders denying motions to dismiss and motions for substitution of attorneys have never been held final for purposes of appeal. *McCullough v. Kammerer Corp.*, 156 Fed. (2d) 343, 345 (9th Cir., 1946), *Western Fruit Growers, Inc. v. United States*, 124 Fed. (2d) 381, 385 (9th Cir., 1941), *Toomey v. Toomey*, 149 Fed. (2d) 19 (App. D.C., 1945), *Ballard v. Mutual Life Ins. Co.*, 109 Fed. (2d) 388 (5th Cir., 1940), *Croissant v. Adams*, 27 Fed. (2d) 48 (7th Cir., 1928) (denial of motion to remove or dismiss attorneys).

(c) The continuance of the trial.

The order continued the trial of the cause *sine die*. Orders continuing or staying trials have never been considered final or appealable. *Bedgisoff v. Cushman*, 12 Fed. (2d) 667 (9th Cir., 1926), *Beckhardt v. National Power & Light Co.*, 164 Fed. (2d) 199 (2nd Cir., 1947), *Cover v. Schwartz*, 112 Fed. (2d) 566 (2nd Cir., 1940), *Mottolese v. Preston*, 172 Fed. (2d) 308 (2nd Cir., 1949). (These cases all involved an indefinite continuance or stay of the trial.)

(d) The deposit of the subject matter of the action in the Registry of the Court.

The order authorized Wells Fargo to deposit the funds, which are subject matter of the action, into the Registry of the Court. It has long been held that orders requiring deposit of funds which are the sub-

ject matter of an action are not final for purposes of appeal. *Louisiana National Bank v. Whitney*, 121 U.S. 284, 30 L. Ed. 961 (1887), *Norris Safe & Lock Co. v. Manganese Steel Safe Co.*, 150 Fed. 577 (9th Cir., 1907).

Upon all the authorities, therefore, the order from which appellant attempts to perfect this appeal does not achieve that degree of finality requisite to this Court's jurisdiction. It was neither complete as to all the parties, or as to the whole subject matter of the action nor did it dispose of the entire controversy and terminate the litigation on its merits.

B. THE ORDER DOES NOT GRANT AN INJUNCTION.

Appellant asserts that the orders of the Court below amount to injunctions and that this Court has jurisdiction of the purported appeal under 28 U.S.C. §1292 (App. Br. p. 3). There are two provisions of the order which conceivably could be considered injunctions:

1. That provision of the order continuing the trial;
2. That provision of the order restraining the plaintiff, those claiming through it and all persons before the Court from enforcing any claim against Wells Fargo.

However, neither of these provisions is an injunction under the well-established principles of appellate jurisdiction.

1. The continuance of the trial was not the exercise of the equitable powers of the Court.

In some circumstances, the grant of a stay of the trial of an action at law has been considered an order granting an injunction and therefore appealable even though interlocutory. However, this rule comes into effect only when equitable relief is sought by way of affirmative defense or cross-bill. *Enelow v. N. Y. Life Ins. Co.*, 293 U.S. 379, 79 L. Ed. 440 (1935), *Shanferoke v. Westchester Service Corp.*, 293 U.S. 449, 79 L. Ed. 583 (1935), *Ettleson v. Metropolitan Life Ins. Co.*, 317 U.S. 188, 87 L. Ed. 176 (1942). In each of these cases an action had been commenced at law and the defendant interposed an equitable defense or cross-bill. In each case also an order granting or denying a stay of the action at law was made by the trial Court. And in each case the order was based upon the equitable defense or cross-bill. The Supreme Court held, in each instance, that the grant or denial of the stay was the act of a court of equity granting or denying an injunction against proceedings in a court of law. It was held immaterial that the proceedings at law and in equity were pending in the same court in view of the established distinction between proceedings in equity and proceedings at law. Nor do the Federal Rules of Civil Procedure, establishing but one form of action in the Federal Courts, change the rule, for the distinction between law and equity persists, at least for this purpose (*Ettleson v. Metropolitan Life Ins. Co.*, *supra*).

In the present case, however, no equitable relief was sought in the District Court nor any granted.

The action was one at law; the answer raised no equitable defenses; nor was an equitable cross-bill filed by the defendant. The motion for summary judgment was intended to obtain a judgment at law, and movant's motion to dismiss or for substitution of attorneys was obviously addressed to the law side of the Court. The Court, in failing to act finally upon the issues raised by the various pleadings and motions, was acting in its capacity as a court of law and by virtue of its inherent power to control the progress of the cause before it. *Morgantown v. Royal Insurance Co.*, 337 U.S., 254, 93 L. Ed. 1347 (1949), *Beckhardt v. National Power & Light*, *supra*. See, also, *Enlow v. New York Life Ins. Co.*, *supra*, 293 U.S., at pp. 381-2, 79 L. Ed., at p. 442. The order continuing the trial was therefore not a grant of an injunction, but an interlocutory order made in the progress of a legal action and therefore not appealable.

2. The order restraining plaintiff from enforcing its claim against Wells Fargo is not an appealable order.

It is clear from the foregoing discussion of the order, from which this appeal is attempted, that the provisions thereof which appear to restrain plaintiff from enforcing its claim against appellee Wells Fargo Bank & Union Trust Co. are purely interlocutory and if appealable at all can be appealed only upon the ground that they constitute a grant of an injunction. Careful analysis of the order and law will show conclusively that no injunction has been granted by this order.

It has already been demonstrated that the action out of which this order arose was an action at law—an action *ex contractu* to recover a demand deposit (see App. Br. p. 11).

The pleadings raised no equitable issues and no equitable powers of the Court were invoked. The Court was acting as a court of law and not as a chancellor. In these circumstances, the order which says that the plaintiff is “restrained” from proceeding and enforcing the claim can only mean that all action on the claim was stayed. The order, in this respect, was merely supplemental to the order continuing the trial and, similar to the order continuing the trial of the cause, was the order of a court of law exercising its inherent power to control the progress of the cause before it. *Morgantown v. Royal Insurance Co., supra*; *Beckhardt v. National Power & Light, supra*. See, also, *Enelow v. New York Life Ins. Co., supra*.

Moreover, it is equally clear that unless the court is acting in a suit in equity, its order cannot operate as an injunction. This proposition became settled law in *Schoenamsgruber v. Hamburg American Lines*, 294 U.S. 454, 79 L. Ed. 989 (1935). In that case the action was in admiralty upon a libel claiming damages for personal injuries. The respondent applied for arbitration which the Court ordered and at the same time stayed the trial of action pending the arbitration. The libellant appealed and this Court dismissed the appeal. *Certiorari* was granted and pending the decision by the Supreme Court, the *Shanferoke* case, *supra*, was decided. In that case the

Court held that a special defense setting up an arbitration agreement in an action at law is an equitable defense or cross-bill (that is, a suit in equity) and that a stay of the trial granted upon such a defense is the grant of an injunction, within the doctrine of the *Enelow* case, *supra*. Therefore, an appeal would lie from such order. However, in the *Schoenamsgruber* case the Court held that, since the admiralty court had no general equitable powers, the defense setting up the arbitration agreement could not be a suit in equity. The action staying the trial was therefore not an injunction but nothing more than an order postponing the trial of an action at law. As such it was not an appealable order.

There was no suit in equity in the Court below, in this case, either by reason of the allegations of the complaint, the answer, or the various motions made. The Court's action in "restraining" plaintiff from proceeding was not therefore the grant of an injunction by a court of equity but merely an interlocutory order of a court of law controlling the progress of the litigation before it. Such an order is not appealable.

Finally, there is ample authority that this order, even if considered an injunction is, nevertheless, not appealable. In *Bennell Realty Co. v. E. G. Skinner & Co., Inc.*, 74 Fed. (2d) 491 (7th Cir., 1935), it was held that an interlocutory injunction enjoining the termination of a lease and fixing a temporary rental pending the determination on the merits was not appealable. The Court said:

“We think that this statute contemplates an injunction or restraining order which actually infringes some right on the part of appellant and the continuation of which pending the final determination of the action will materially affect its interests”. (74 Fed. (2d) at p. 494.)

and that:

“* * * no appeal would lie in a case in which the injunction order was nominal or in which the decree would be equally effective without it * * *” (74 Fed. (2d) at p. 494.)

The order in this case is nominal, too, for the continuance granted by other provisions of the order and the pendency of the original action itself would prevent appellant from attempting any other proceeding to enforce its claim.

CONCLUSION.

Appellant's real complaint is that the Court below failed to reach a final determination of the adverse claims to this fund. Until such a determination is made, this Court has no jurisdiction over an appeal. The purported appeal, therefore, must be dismissed.

II.

THE SOLE ISSUE BEFORE THE DISTRICT COURT WAS THE AUTHORITY OF APPELLANT OR MOVANT-APPELLEE TO REPRESENT THE BANK OF CHINA, A PRIVATE CORPORATION, IN THE ACTION AGAINST WELLS FARGO. THIS WAS A JUDICIAL QUESTION TO BE DECIDED ON THE FACTS AND APPLICABLE LEGAL PRINCIPLES. THE ISSUE DID NOT INVOLVE THE POLITICAL QUESTIONS OF RECOGNITION OR NON-RECOGNITION.

A. INTRODUCTION.

The District Court had before it three important considerations which flowed from the facts adduced by the parties. The record established the following in broad outline:

1. The Bank of China, a private corporation organized in 1912 and "which has weathered previous governmental upheavals" (R. 102), continues to exist and operate in China under the People's Republic. It has not been nationalized nor dissolved, nor have its assets been confiscated or expropriated. Most of its private shareholders retain their equity. All of its branches, its business departments, its banking functions continue uninterrupted. It functions through its board of directors which continues to exist, although its meetings were temporarily suspended because some of its personnel had been dispersed. In accordance with its Charter, a majority of the stock of the corporation is owned and in the possession of the Government of the People's Republic; the balance of the stock is in the hands of private persons in China, held "by five thousand different individuals" (R. 165).

2. The individuals who instigated this lawsuit represent no one but themselves (R. 235-244). They seek

to obtain possession and control of funds now on deposit by the Bank of China with an American national. If these funds are turned over to the aforesaid individuals, the funds will be lost forever to its rightful claimants: the depositors, creditors and stockholders of the Bank of China. Should these individuals succeed in obtaining the funds, they will be accountable to no one. In addition, if the demand and institution of the present suit is unauthorized, Wells Fargo will suffer double liability.

3. The People's Republic of China has replaced the so-called Nationalist Government, and the latter has not for almost two years exercised any governmental or proprietary functions on the territorial mainland of China. The United States Government is cognizant of these facts and has no disposition to ignore them. Its failure to accord recognition "de jure" to the People's Republic is not based on the ground that it does not exist, nor exercise control and authority in the territory of China, but on other considerations.

The District Court was bound to exercise a judicial function, to pass upon a controversy between two groups of foreign nationals each contending that they were the true agents of an alien corporation. If the Bank of China is a private corporation organized and doing business on the mainland of China; if there is an existent board of directors duly elected by private and governmental stockholders; if the management of the corporation has revoked all prior powers of attorney and appointed new agents; if the Bank has made no demand on its American depository for any

of its funds and has not authorized the institution of any suit to obtain such funds—those are facts which no court of law can ignore. “Irrespective of recognition or non-recognition, the courts may take cognizance of any fact pertinent to the protection of private and public rights, including the acknowledgment of the existence of a new state or government.” Brown, P.M., *The Legal Effects of Recognition*, 44 *American Journal of International Law* 617-640, 639 (October, 1950).

The basic fallacy which permeated appellant’s argument below and still persists here is the view that an unrecognized government is a party to this action. Such position is contrary to the facts and law, not only as shown by movant, but as shown by appellant itself on the record. The suit herein was instituted by the appellant in the name of the Bank of China. In its pleadings, and by its witnesses, the appellant has constantly maintained that the Bank of China is a separate entity, independent of the Government, even though not privately owned. The Supreme Court of the United States by unanimous decision in *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 51 S. Ct. 229 (1931) held that a corporation, a juridical entity that could not exist were it not for the acts of the unrecognized government, may be a party litigant (the decision is discussed hereafter in detail). In *Amtorg Trading Corporation v. United States*, 71 F. (2d) 524 (Ct. of Cust. & Pat. App., 1934), the Court stated (pp. 528, 529):

“When a government becomes a stockholder in a corporation, it does not exercise its sovereignty

as such. 'It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act.' (Citations.) Nor does the fact that the government may own all or a majority of the capital stock take from the corporation its character as such, or make the government the real party in interest." (Citations.)

B. APPLICABLE LEGAL PRINCIPLES.

It is now firmly established that international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. *Kansas v. Colorado*, 206 U.S. 46, 77, 27 S. Ct. 655 (1907). In accordance therewith, courts of law will always take cognizance of the domestic acts and transactions of private individuals and corporate personalities in states where *de facto* governments exist. The rule is grounded on the essential continuity in the life of the state, irrespective of changes of governments or of alterations in the normal administration of civil affairs and justice. This principle is today the law of the land. It is embodied in solemn treaty between the United States and other states. Convention Between the United States of America and Other American Republics on Rights and Duties of States, 49 Stat. 3097.

"The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and property, and conse-

quently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.”⁶ (*Supra*, p. 3100.)

Since the inception of the Republic, the United States Supreme Court has uniformly held that the principle of continuity in the external relations of the state imposes logically the acceptance of another fundamental principle, namely, the validity of acts and transactions which take place under a *de facto* government. *United States v. Rice*, 4 Wheat. (U.S.) 246, 4 Law. Ed. 562 (1819); *Thorington v. Smith*, 8 Wall. (U.S.) 1, 19 L. Ed. 361 (1869); *Texas v. White*, 7 Wall. (U.S.) 700, 19 L. Ed. 227; *United States v. Home Insurance Co.*, 89 U.S. 99, 22 L. Ed. 816 (1875); *Underhill v. Hernandez*, 168 U.S. 250, 18 S. Ct. 83 (1897); *Baldy v. Hunter*, 171 U.S. 388, 18 S. Ct. 890 (1898); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 51 S. Ct. 229 (1931).

The aforesaid decisions emphasize that “recognition” is a political decision made by the executive arm of the government. It is often dependent on factors far removed from the question as to whether a government in fact exists in a given territory, to which the people give obedience, and which is capable of enforcing its laws. Courts of law in this country, on

⁶In terms of the rules of law governing the effect of recognition and nonrecognition, the concepts of “State” and “Government” are and have been used interchangeably. *Texas v. White*, 7 Wall. (U.S.) 709, 702; *Lauterpacht, Recognition in International Law* (1947), p. 87.

the other hand, are created to adjudicate private controversies. In making their determinations, they cannot ignore the facts which govern the controversy. They cannot ignore the existence of a people in a territory ruled by a government, nor can they ignore the fact that transactions which occur on such territory are governed by the rules of law adopted in such territory and affecting the inhabitants therein. These are facts upon which judicial determinations must be made. These are matters peculiarly within the province of the judicial arm of government. Constitutional deference by one arm of government to another is a reciprocal obligation—each is supreme in its own forum. The absence of recognition by the executive arm of government does not negative the existence of a state, nor the consequences which flow from the existence of such state and government.

Thus, for example, in *Thorington v. Smith, supra*, the Supreme Court had before it the problem as to whether a contract for the payment of Confederate notes, made during the Civil War, between parties residing within the Confederate States, was enforceable on the Courts of the United States. Clearly, there had been no political recognition of the Confederate States by the Federal Government against which the States were in open rebellion.

“It is familiar history, that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment, within its boundaries, of a separate and independent confederation. A governmental organization, representing these States,

was established at Montgomery, in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent * * * It was by the central authority thus organized and under its direction, that civil war was carried on upon a vast scale against the government of the United States for more than four years. Its power was recognized as supreme in nearly the whole of the territories of the States confederated in insurrection. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the National government." (p. 7.)

Describing governments such as the Confederate States as governments *de facto* or governments of paramount force whose existence the Courts cannot ignore, the Supreme Court then addressed itself to the question of the legality of the transactions which take place in territories controlled by such governments.

"It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it is circulated, and from the necessity of an obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States * * * They are transactions on the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced

in courts of the United States, after the restoration of peace, to the extent of their just obligations." (pp. 11-12.)

In *United States v. Home Insurance Company*, *supra*, the legislatures of the insurgent states were held empowered to create corporations, such as insurance, banking and trust companies, which corporations successfully prosecuted suits for the recovery of their funds paid into the treasury of the United States. In *Underhill v. Hernandez*, *supra*, the Supreme Court affirmed that "every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves" (p. 252). The Supreme Court added significantly, "Nor can the principle be confined to lawful or recognized governments or to cases where redress can manifestly be had through public channels" (p. 252).

The decision in *Russian Volunteer Fleet v. United States*, *supra*, is of decisive importance here. In 1924, a petition was filed in the Court of Claims alleging that the Russian Volunteer Fleet was a "corporation duly organized under, and by virtue of the laws of Russia"; that in 1917 it had become the assignee for value of certain contracts for the construction of two vessels in America; that these contracts had been requisitioned by Executive Order and the vessels were constructed for the use of the United States; and

that the United States thereby became liable to the petitioner for the payment of just compensation. The Court of Claims dismissed the petition upon the ground that the United States Government had not recognized the Soviet Union, and that the corporation could not be considered "the citizen of any government" within the purview of Section 155 of the Judicial Code which governed suits by aliens against the United States. In the argument before the Supreme Court, a letter from the Secretary of State was submitted stating that "the Government of the United States had not extended recognition to any regime established in Russia subsequent to the overthrow of the Provisional Government". Writing for a unanimous Court, Chief Justice Hughes said:

"Nor do we regard it as an admissible construction of the Act of June 15, 1917, to hold that the Congress intended that the right of an alien friend to recover just compensation should be defeated or postponed because of the lack of recognition by the Government of the United States of the regime in his country. *A fortiori* as the right to compensation for which the acts provided sprang into existence at the time of the taking, there is no ground for saying that the statute was not to apply, if at a later date and before compensation was actually made, there should be a revolution in the country of the owner and the ensuing regime should not be recognized. The question as presented here is not one of a claim advanced by or on behalf of a foreign government or regime, but is simply one of compensating an owner of property taken by the United States." (p. 492.)

The leading international law opinion on the issue here under consideration is the historic ruling of Chief Justice Taft, acting as sole arbitrator between Britain and Costa Rica, 18 American Journal of International Law 147. In his conclusions of law, he stated:

“I must hold from the evidence that the Tinoco government was an actual sovereign government. But it is urged that many leading powers (including the United States) refused to recognize the Tinoco government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly recognition by other powers is an important evidential factor in establishing proof of the existence of a government in the society of nations * * * nonrecognition * * * cannot outweigh the evidence * * * as to the *de facto* character of Tinoco's government, according to the standard set by international law.”

It was in the light of these general principles that the District Court was bound, it is respectfully submitted, to consider the facts before it. Not only were the United States Supreme Court decisions decisive on the issue, but an entire body of decisions by the lower Federal and State Courts all pointed in the same direction. These cases, on the main, were the product of events which followed the Russian Revolution in 1917 and the failure of the Government of the United States to extend recognition to the Soviet Union until 1933. A number of decisions, not pertinent here, dealt with the effect of decrees of expropriation or naturalization on assets outside the Soviet Union. Because of the misunderstanding both of the

nature of recognition and of the legal effects resulting from recognition or from nonrecognition, these decisions of the lower Courts were often contradictory and confusing, leading in many cases to serious miscarriages of justice. Mr. Justice Frankfurter stated at a later date in reviewing these decisions that they were largely the "product of casuistry, confusion and indecision". *United States v. Pink*, 315 U.S., 203, 235. See also, Jaffe, L.L., *Judicial Aspects of Foreign Relations*, 1933; Brown, P.M., *The Legal Effects of Recognition*, 44 *American Journal of International Law*, 617-640 (October, 1950).

The Russian situation was, however, productive of decisions not involving extra-territorial confiscation. These decisions simply carried forward the basic principles which had been enunciated in the Supreme Court decisions: that a stable and effective *de facto* regime, albeit unrecognized, may not be ignored; that in relation to matters within its territorial jurisdiction, and particularly involving its own nationals such effect must be given to its domestic legislation as would be given to a regime wholly recognized *de jure*.

In *Wulfsohn v. Russian Socialist Federated Republic*, 234 N.Y. 372, 138 N.E. 24, writ diss. 266 U.S. 580 (1923), an action was instituted in 1922 against the Russian Government to litigate the title to certain property confiscated by that Government. In holding that the unrecognized government was immune from such suit, the Court of Appeals stated:

"The result we reach depends upon more basic considerations than recognition or nonrecognition by the United States. Whether or not a government exists clothed with the power to enforce its

authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact not a theory. For its recognition does not create the state although it may be desirable. So only are diplomatic relations permitted. Treaties made with the government which it succeeds may again come into effect. It is a testimony of friendly intentions. Also in the country granting the recognition that act is conclusive as to the existence of the government recognized. (Citations.) Again recognition may become important where the actual existence of a government created by rebellion or otherwise becomes a political question affecting our neutrality laws, the recognition of the decrees of prize courts and similar questions. But except in such instances the fact of the existence of such a government wherever it becomes material may probably be proved on other ways." (p. 375.)

Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933) was decided by the Court of Appeals shortly before recognition. The Soviet Government had nationalized some oil lands belonging to plaintiff and sold the oil to defendant. Plaintiff sued for an accounting. The complaint was dismissed. The Court of Appeals pointed out that complete inquiry by the trial Court had brought forth the acknowledgment from the State Department that it was "cognizant of the fact that the Soviet regime is exercising control and power in territory of the former Russian Empire and the Department of State has no disposition to ignore that fact. The refusal of the Government of

the United States to accord recognition to the Soviet regime is not based on the ground that that regime does not exercise control and authority in territory of the former Russian Empire, but on other facts" (p. 224). The Court of Appeals then stated:

"As a juristic conception, what is Soviet Russia? A band of robbers or a government? We all know that it is a government. The State Department knows it, the courts, the nations and the man on the street. If it is a government in fact, its decrees have force within its borders and over its nationals * * * The courts may not recognize the Soviet government as the *de jure* government until the State Department gives the word. They may, however, say that it is a government, maintaining internal peace and order, providing for national defense and the general welfare, carrying on relations with our government and others. To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country, is to give to fictions an air of reality which they do not deserve." (p. 226.)

After disavowing any prior expressions in its opinions which may have given rise to a different inference, the Court of Appeals concluded (p. 228):

"Nonrecognition is no answer to defendant's contention, no reason for regarding as of no legal effect the laws of an unrecognized government ruling by force, as the Soviet government in Russia concededly was."

In *Banque de France v. Equitable Trust Co.*, 33 F. (2d) 202 (S.D.N.Y. 1929), the Bank of France sought to recover gold in the Trust Company's possession which it alleged had been illegally confiscated

by the State Bank of the Soviet Union. The Court stated:

“This court should not assume that the Union of Soviet Socialist Republics acquired title to the gold in question by confiscation or in any manner inconsistent with our accepted standards. If there are any circumstances under which the Soviet Government might acquire title to property which would be recognized then these defendants, American nationals, should be allowed an opportunity to show the circumstances relating to their source of title (p. 205) * * * the refusal of the political department to recognize a government should not be allowed to affect private rights which may depend upon proving the existing conditions in such state.” (pp. 205-206.)

See also, *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, 28 F. Supp. 279 (S.D.N.Y. 1939).

In *The Denny*, 127 F. (2d) 404 (C.C.A. 3rd, 1942), the facts were as follows: In 1940, one Litamcor purchased on behalf of two associations organized under the laws of Lithuania, a ship, the S.S. DENNY, and a cargo of gasoline and oil. The vessel remained in the United States in Litamcor's possession. In 1941, a libel on the vessel and cargo was filed by one Recht, purporting to act as attorney-in-fact for the Lithuanian associations. Thereafter Litamcor was appointed trustee of the vessel by the Consul General of the Republic of Lithuania, and Litamcor filed an answer to the libel as such Trustee. Before the matter came on for trial, Recht, acting now as attorney-in-fact for the State Steamship Line, a corporation of the Soviet Socialist Republic of Latvia, obtained

leave for that corporation to intervene as libelant. The District Court dismissed the libel and the intervening libel. In reversing the decrees, the Court of Appeals held in language most pertinent here:

“Finally it is argued that since the government of the Lithuanian Socialist Republic and its admission to the Union of Soviet Socialistic Republics have not been recognized by our government, this Court may not, by permitting Recht to act under the powers of attorney given to him, recognize or give effect to the decrees of the Soviet Socialist Republic which reorganized Lietukis and nationalized Baltic Lloyd. But these are both Lithuanian associations and the parties in interest, so far as here appears, are all citizens of Lithuania and domiciled therein. The rights of American citizens as residents are not involved. We may not ignore the fact that the Soviet Socialist government did actually exercise governmental authority in Lithuania at the time the decrees in question were made and the powers of attorney were given, but must treat its acts within its own territory as valid and binding upon its nationals domiciled therein. It follows that the respondents may not question in this court the validity of the Lithuanian decrees in so far as concerns their effect upon the interests of the former members of the associations therein or the validity of the powers of attorney executed by the association’s officers and offered in this proceeding.” (p. 410.)

The significance of this uniform body of authorities could not be avoided by the District Court. It was clear to the Court that the Bank of China continues to exist as a private corporation. The governing offi-

cials of the corporation within the territory under whose sovereignty alone it can continue to exist are duly acting under its pre-existing charter. The withholding of recognition cannot impair the right of a corporation of an unrecognized state to act to protect its property. *Russian Volunteer Fleet v. United States, supra*. The fact that recognition *de jure* may be elsewhere does not confer on nationals of the unrecognized states, in litigation here, the right to ignore changes in corporate status or authority that have occurred within its territory and in conformity with its laws. *The Denny, supra*. Courts will not give fictions the effect of reality and deny here the natural consequences of the force which the decrees of a government in fact has within its borders and over its nationals. *Salimoff v. Standard Oil Co., supra*. Except as to the reception of diplomatic representatives, questions affecting our neutrality laws, recognition of the decrees of prize Courts, and similar questions, the fact of the existence of a *de facto* government wherever it becomes material may be proved in other ways than action of the political department. *Wulfsohn v. Russian Socialist Federated Republic, supra*. These were the principles of law which the District Court was required to apply to the facts in controversy.

C. THE FACTS BEFORE THE DISTRICT COURT REQUIRED THE APPLICATION OF THE AFORESAID GENERAL LEGAL PRINCIPLES.

1. The issue before the District Court was in essence a narrow one. One group of Chinese nationals asserted that it had authority to act for the Bank of

China. Another group of Chinese nationals asserted that authority was vested in them. The question to be decided was: who were the true agents of the Bank of China.

2. The Bank of China is an institution with over two hundred branches, throughout the territorial mainland of China, and over twenty agencies abroad (R. 273). There is no evidence that the Bank ever had a branch on Formosa. The Bank conducts a general commercial business, including: granting of commercial credits; discount or purchase of commercial bills and drafts; handling all kinds of deposits; acceptance of securities for safekeeping; collection of commercial paper for companies, other local banks, and individual clients; granting of loans against reliable securities (Articles of Association, XI, R. 306; By-Laws, XVIII, R. 203). The funds affected by the present suit are "definitely not" public funds of the government deposited abroad; they are "private" deposits, the product of the "commercial" operations of the bank (R. 283).

The Bank has participated in as much as 42.2% of loans to farmers made throughout China and has had 28% of the total of savings deposits in the four largest banks (Chinese Year Book, 1943, pp. 438-9). Its income account in 1947 shows interest of 438,032,414 thousands of Chinese dollars and commissions of 51,934,155 thousands (Moody's Banks, Insurance, Real Estate Investment Trusts, 1949, p. 893). Its 1947 balance sheet shows *inter alia* the following figures, also in thousands of Chinese dollars (*id*):

Due from banks	11,965,539,719
Demand loans	1,822,634,878
Time loans	231,288,644
Securities & Investments	7,815,247,525

Its liabilities—which the real management in Peking have neither been shown to have repudiated nor failed to discharge, include, among others (*id*):

Due to Banks	9,325,779,397
Demand Deposits	5,080,268,846
Rediscounts & Cldrs.	186,111,650
Remittances, etc.	590,467,262
Accounts Payable, etc.	3,060,332,105

It has previously been noted that the private shareholders of the Bank number approximately five thousand, dispersed throughout the mainland of China (R. 165, 170). Only Chinese nationals are eligible to own shares of stock of the Bank (By-Laws, VI, R. 200).

3. The District Court was faced with the fact that the individuals who instigated the lawsuit were without standing, entirely apart from the repudiation of their conduct expressed in the cables from the Bank of China referred to in the Statement of Facts herein. The question of the relationship of the Bank of China to individuals removed from office long before the recent political changes (R. 85), who represented to the District Court that they were acting under a 1935 charter (R. 14) when substantial amendments had been made in 1944 (R. 92) raised grave doubts relative to the validity of appellant's claim and lawsuit. In the ultimate sense, the Court's jurisdiction was involved if the suit pending before it was legally spurious.

The action was instituted by appellant solely on the basis of a power of attorney dated December, 1946, purportedly given by the Bank of China to one Tuh-Yueh Lee, who described himself as "manager of the New York agency of the Bank of China" (R. 245), which position he took over in 1946. No matter how broadly drafted, a power of attorney intended to furnish authority to manage a local branch of a corporation is not usually construed to permit its holder to seize assets held for the bank's head office. See *Andre v. Beha*, 211 App. Div. 380, 208 N.Y. Supp. 65, aff'd 240 N.Y. 605, 148 N.E. 724 (1925). If the power of attorney were limited to the management of the New York Agency, its general language might appropriately be held limited to its specific area coverage. However, to construe the power of attorney as vesting power in an employee of a corporation to exercise the authority of a Board of Directors throughout a country, permitting him without limitation to collect the funds of that corporation wherever they may be found "without inquiry as to the circumstances of issue or the disposition of the proceeds" (Power of Attorney, Par. 5, R. 40); to authorize an employee to lend money without security (Power of Attorney, Par. 9, R. 43) contrary to the express provisions of the Articles of Association (XII, R. 307) and By-Laws (XIX, R. 204) raised serious doubts concerning Lee's authority.

Moreover, and most significantly, Lee did not construe his power of attorney as authorizing him to draw out any funds from Wells-Fargo unless instructed to do so (R. 266). This was confirmed by Hsi Te-Mou (R. 242). But Lee had never consulted the

management of the Bank of China before instituting the suit. He had "talked" with only two individuals, Mr. Hsi and Dr. Kung (R. 262). In the case of Dr. Kung, he had not even been connected with the Bank since April 30, 1948 (R. 85), long before recent political changes took place.

Moreover, the record showed that Lee made no effort to ascertain whether his claimed authority still continued. Clearly, he had the legal duty in the light of events which occurred in China after 1946 to ascertain whether his authority continued. Lee knew that the vice president of the Wells-Fargo Bank had been notified on four different occasions by the Bank of China in Shanghai not to make any payments to anyone except on order from the bank at Shanghai (R. 130-147). Lee knew that the bank had appointed new officers, cancelled signatures and taken every step to make clear that any authority under which Lee might claim had been revoked (R. 261). Lee knew that the head office of the bank was by the Articles of Association located in Shanghai (III, R. 304). Yet others were claiming that the head office was in Canton (R. 270), in Chungking (R. 36), and even in Hong-kong (R. 270). Knowing all this, and without ascertaining the wishes or actions of the Board of Directors of the Bank of China, or its lawful officials, Lee instituted suit demanding payment of a large sum of money—all of this solely on the basis of a power of attorney given him in 1946. See Restatement of Agency, Sections 33, 115. This entire action had been instituted by appellant, as the District Court could plainly discern, solely on the instigation of Kung and

Hsi Te-Mou in New York. Kung had no authority, Hsi Te-Mou knew there could be no "directors" meeting since a quorum was not available (R. 236). He did not have possession of the books, records and accounts of the Bank (R. 243). He knew that the last shareholders' meeting had taken place in 1948 (R. 237). He knew, of course, of all the changes that had taken place in the management of the bank since 1948 (R. 239). The fact was that even on appellant's own showing, its complaint in the District Court was subject to dismissal.

4. There was no doubt, as we have shown, that the Bank of China was an existent private corporation operating in the territory of China. Had the stock of the Bank of China been held entirely by private stockholders, there is also little doubt that their selection of a new Board of Directors and management, despite a change in government, would have been binding on the courts of this country; and their selection of new agents and determination as to the disposition of the funds in Wells-Fargo would have been conclusive here. It is submitted that the situation was not changed because a portion of the stock, pursuant to the bank's charter, was held by the government.

The only question left for the District Court was whether or not a government existed in the territory of China capable of holding the stock and acting as a stockholder along with the private stockholders in the selection of a new management pursuant to the charter and by-laws of the bank. On this issue, appellant hardly was in a position to deny the existence of such a government. In fact it was conceded (R. 349). Its

sole reliance was on the fact that political recognition has not been extended to the government. But that issue was not before the District Court. The Court's concern was whether *in fact* a government existed on the mainland of China, in effective control and supported by the Chinese people, capable of holding stock in a private corporation. As to whether such a government existed, the short answer was: "The State Department knows it, the courts, the nations and the man on the street." *Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 226, 186 N.E. 679, 682 (1933).

It is a matter of common knowledge that the Central People's Government of the People's Republic of China exists in fact. It has been recognized by at least the following countries: Great Britain, India, Denmark, Switzerland, Israel, Ceylon, Pakistan, Burma, Norway, Poland, Rumania, Hungary, Bulgaria, Yugoslavia, Czechoslovakia and the Soviet Union. Notes accompanying this recognition as in the cases of Great Britain and India were usually premised on the basis of the effective control by the People's Government of the territory of China, support by the mass of the Chinese people to the new regime; and the agreement by the new Government that it would abide by its international obligations. The San Francisco Chronicle of December 31, 1949, stated editorially that "the United States is up against the fact that the Communist regime is clearly a *de facto* regime". On December 30, 1949, the New York Times foreign editor reported: "The Communist regime at Peiping, now in control of the whole of the Chinese mainland, will probably be recognized by India this

week and by the British before January 10." On December 11, 1949, the San Francisco Chronicle, reporting on a conference of the World Affairs Council, quoted Roger D. Lapham, former Mayor of San Francisco and recently head of the Economic Co-operation Administration's China Aid Mission as saying, "It cannot be denied that the Communists have de facto control of all China". The Secretary of State stated, "And now it is abundantly clear that we must face the situation as it exists in fact" (Department of State Publications 3573, Far Eastern Series 30, p. XVI). On January 15, 1950, the New York Times reported that the State Department had "instructed Mr. Clubb (American Consul General in Peiping) to make known to Chou En-Lai, Foreign Minister of the Communist Government that certain buildings in the city were the property of the United States". A number of such "formal notes" were sent to the Foreign Minister, the New York Times reported. The entire American press reported on or about October 1, 1949, that the People's Republic of China, with a new government and new constitution had been established; legislative, executive and judicial departments created; and officials were duly filling offices of state. On November 28, 1950, at the invitation of the United Nations, a representative of the Central People's Government of the People's Republic of China attended and addressed a meeting of the United Nations Security Council at Lake Success, New York.

5. The facts before the District Court were, therefore, wholly in favor of movant's position. It was clear that the stockholders of the Bank of China, gov-

ernmental and private, had selected a new board of directors and management; that it had revoked all previous powers of attorney; that it had selected new agents to represent the Bank (see Statement of Facts herein); that both the Bank and its true representatives had made no demand upon Wells-Fargo nor authorized the institution of the suit; that those who instituted the suit were strangers to the Bank and wholly without power to act in its name. Had the motion been heard and determined on its merits, both the facts and the overwhelming weight of authoritative decisions would have required the District Court to either dismiss the complaint or permit a substitution of counsel.

Instead, the District Court continued the trial of the cause *sine die*, leaving the "funds where they are for the present" (R. 105), and maintaining "the status quo" (R. 105). The movant-appellee submits that in the light of the aforesaid analysis of the law and facts, the postponement of the trial herein affected its rights far more adversely than those of appellant. The position taken here by appellant appears to rest on an almost complete disregard of the facts before the District Court and an untenable view of the applicable law. The subsequent discussion in this brief is devoted to an examination of appellants' arguments and an analysis of their validity.

III.

THE APPELLANT'S DISCUSSION OF THE LAW AND FACTS IGNORES THE RECORD AND THE ISSUE BEFORE THE DISTRICT COURT. THE RIGHT TO REPRESENT THE BANK OF CHINA IN THE ACTION AGAINST WELLS FARGO WAS A JUDICIAL AND NOT A POLITICAL QUESTION.

The appellant's argument is that it is entitled to judgment as a matter of law (App. Br. pp. 26-28). It asks this Appellate Court at this stage of the proceedings to enter or direct the entry of judgment in a sum over \$800,000 without any further judicial consideration of the facts (App. Br. p. 28). The appellant, which constitutes one group of Chinese nationals, requests this Court to disregard the rights of the sole American national involved. Wells-Fargo, and the other group of Chinese nationals whose proof that they represent the Bank of China is complete and factually uncontroverted (App. Br. p. 12). Even if the demand and action initiated by Messrs. Lee, Kung and Hsi should prove to be wholly without authority; even if those who claim to be directors of the Bank could not get together a quorum (R. 237); even if the appellant has not presented the slightest evidence to prove that the Board of Directors or any authorized official countenanced this attempt to gain control over the funds of the Bank of China—even so, appellant assures this Court (App. Br. p. 12), Wells-Fargo is in no jeopardy and the Bank of China and its true agents will never be able to demand another sum of \$800,000 from this American bank. It is submitted that there is nothing in appellant's brief to justify this gratuitous conclusion.

A. THE APPELLANT OVERLOOKS THE ISSUE BEFORE THE DISTRICT COURT.

The appellant states in its brief (p. 13): "The Bank of China, the owner of the Wells-Fargo deposits, is in full operation and entitled to the return of its funds." The appellant concedes therefore, as it must, in the light of the testimony of its own witnesses, that this is not a suit by or against any foreign government. The District Court had no such issue before it. All that was pending before the District Court was a simple action brought by a private corporation to recover a deposit. Raised by appropriate motion was a challenge to the authority of those persons who authorized the action to act for and in the name of Bank of China. Who was the true agent of the Bank of China? That question had to be answered by the District Court for two reasons: (1) If the demand on Wells Fargo was unauthorized, the suit which had been instituted was spurious; (2) If the claim and suit were unauthorized, Wells Fargo, the only American national involved, was being subjected to the possibility of a loss of \$800,000 through no fault of its own.

The District Court had before it sufficient testimony by affidavits and depositions to warrant the conclusion that a judicial hearing would have to be held to determine the question of agency, not only for the protection of the defendant Wells Fargo but as a vindication of the Court's own authority to entertain the action at all. The appellant's attempt to show its authority had foundered on its own testimony. It had

presented nothing other than some private action by three individuals in the United States. (Compare, By-Laws, Articles III, VI, XXIII-XXX, XXXII-XXXIV, XXXV-XXXVI, XLIV; R. 198-223). The showing made by movant, as to its authority to represent the Bank of China, was more than *prima facie*; it was complete and in no way denied. All that the District Court decided was that a full hearing upon this issue of authority to represent the Bank of China should be postponed (R. 95-106).

The appellant treats this appeal as if it were upon a full record and judgment after trial. That is not the case at all. The issue before the District Court and on this appeal is not whether "the Communists" have a "claim to the San Francisco bank deposits of appellant" (App. Br. p. 13); it is not whether "an unrecognized foreign government" can "acquire a claim to assets in the United States" (App. Br. p. 14); It is not whether "the Communists" have a "claim to the Government stock in the Bank of China" (App. Br. 21); it is not whether "the Communists" can "be heard" to assert a claim to appellant's deposits with Wells Fargo (App. Br. p. 24). The sole question is whether the order of the District Court postponing the hearing on the issue as to who is authorized to represent the Bank of China in the suit against Wells Fargo is appealable, and if appealable, whether the order should be affirmed as an exercise of sound judicial discretion or remanded to the District Court for full hearing.

B. THE APPELLANT OVERLOOKS THE FACTS IN THE RECORD.

The appellant's brief completely disregards the facts as they were presented to the District Court, not only by the movant but by the appellant itself. The appellant states in its "Introduction" (p. 1) that it is now "conducting its banking operations from its head office in Formosa." There is no evidence in the record of a head office in Formosa nor the conduct of any banking operations there. There is no evidence that the Articles of Association (III, R. 304) or the By-Laws (III, R. 198) were ever lawfully amended to change the head office from Shanghai. All that we have in the record is that the individuals on Formosa did not even concern themselves with the institution of the present suit (R. 264-265) nor was a quorum available there of those who claimed to be directors (R. 237).

The "Introduction" of appellant's brief states (p. 1) that Wells Fargo refused to pay because "representatives of the Communist People's Government of China—claimed that they had become legal representatives of the Bank of China." It is stated further that "attorneys for the Communists" (p. 2) appeared in the District Court and moved to dismiss the action on the ground "that the appellant Bank of China operating from Formosa, was not entitled to maintain them" (p. 2). There is not the slightest evidence in the record to support these assertions. The movant affirmed and was ready to establish that in accordance with the By-Laws and Articles of Association of the Bank of China, duly authorized meetings of the shareholders of the Bank of China existing and operating in

the territory of China had duly elected a Board of Directors and management, who had in turn appointed movant as representative of the Bank of China in the United States with instructions to appear in the action against Wells Fargo for the protection of the Bank (R. 75-94). It is therefore incorrect for the appellant to state that the District Court "held in effect that, since the Bank of China had lost certain of its assets in China by seizure and conquest, it was also to be deprived of its San Francisco assets." (p. 2). The District Court really held in effect as its opinion clearly shows (R. 96-106) that movant had made a strong showing as to its right to represent the Bank (R. 99-100); that appellant's showing (R. 103) was untenable and that this question of fact concerning the true agent of the Bank of China should be left for a later determination (R. 105).

In its "Statement of the Case" (App. Br. pp. 3-8), appellant constantly treats the Bank of China as some "creature" of the so-called "National Government of the Republic of China." It states that with respect to the Bank, the National Government "had full power to direct its destiny" (App. Br. p. 5). This is, of course, in conflict with first principles of the law of corporations as known to our jurisprudence, and contradicted by appellant's own showing as to the history of the Bank of China. The juridical personality endowed on a corporation is a product of an act of sovereignty—emanating not from any particular government, but from the state. The rights of a sovereign state are vested in *it*, rather than any particular government which may purport to represent it. *Guaranty*

Trust Co. v. United States, 304 U.S. 126, 137. Corporations acquire authority from the sovereign power of the state. 18 C.J.S. 404. Indeed, a familiar example of their survival of a transfer of sovereignty is found in the fact that corporations, created in the "American Colonies" by English Kings, still exist in the United States. 18 C.J.S. 367. In the deposition of Hsi Te-Mou (R. 187) it is admitted that the Bank of China was organized in 1912, and has existed continuously since that time. As the District Court noted, the Bank of China "has weathered previous government upheavals" (R. 102).

In its efforts to avoid the actual issue involved on this appeal, the appellant enmeshes itself in a welter of contradictory statements and distortions of the facts in the record. It speaks of the bank as having both public and private functions (p. 4), but it overlooks the testimony of Hsi Te-Mou, its own witness,— "The Bank of China is a commercial bank and its deposits with Wells Fargo are private deposits" (R. 284). It admits that the purported directors are all scattered (p. 4) including a group of seven, the "managing directors" of the bank, the so-called executive committee. It omits to state that five of the persons claimed to be "managing directors" now are and for sometime have been in the United States (R. 239, 277); this despite the requirement of the by-laws (XXXII) that the managing directors "shall regularly be present at the Bank to attend to their respective duties" (R. 208). It overlooks that its own witnesses were uncertain as to what was going on in Taiwan (Formosa) (R. 279); that few records were there (R. 283); and there seems to be considerable

doubt as to the nature and extent of communications between Formosa and New York (R. 228-229, 243, 272). Mr. Hsi himself—the “general manager” required by the by-laws (XXVIII) to “manage the affairs of the whole bank” (R. 207)—has been in the United States since June or July, 1949 (R. 282). The books and records which he originally claimed to be under his control (R. 35) were subsequently admitted to be such only “by courtesy” (R. 243).

The appellant states that the bank “moved” from Shanghai to Canton, from Canton to Chungking and finally from Chungking to Formosa (App. Br. p. 5). There is a significant omission in the record concerning the action of the general shareholders in this regard (By-Laws, XLIV, XLV, R. 215) or the Board of Directors (By-Laws, XXXVI, R. 211). At another point (App. Br. p. 6), the appellant refers to the head office, foreign department located in Hongkong from which instructions emanated, although this does not appear to accord with appellant’s prior description of the “movement” of the Bank of China.⁷ More-

⁷In its efforts to persuade the District Court that the Bank of China had “moved” and to wave out of existence the Bank in territorial China with its two hundred branches throughout the mainland, its stockholders, creditors and depositors, the appellant offered a “certificate” (R. 298-299) by an official to establish that such movement had lawfully occurred. The certificate was entirely worthless on the issue of whether or not the Bank of China had *in fact* moved. *Von Zedtwitz v. Sutherland*, 26 F. (2d) 525, 526 (App. D.C. 1928); *People v. Galnel*, 57 Cal. App. (2d) 788, 135 P. (2d) 378 (1943); *Matter of Asterio*, 172 Misc. 1081, 1084, 16 N.Y.S. (2d) 943 (1939); *Matter of Johnson*, 172 Misc. 1075, 1077, 16 N.Y.S. (2d) 855 (1939). Nor could the “certificate” prove the “lawfulness” of the removal. An official may prove the text of a law; but foreign law must always be determined as a question of fact. The Articles of Association (XXIV, R. 310) provide that as to matters not specifically set forth therein, the “company Laws” of China apply. These laws could only be determined as questions of fact, and as to these no

over, although it constantly injects the notion that the plaintiff in the action which appellant instituted is the "National Government," it finally concedes that the funds in Wells Fargo "belonged in each case to the single corporate entity, 'Bank of China' " (App. Br. p. 5).

C. THE APPELLANT OVERLOOKS THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT AND THE ENTIRE BODY OF OTHER LEGAL PRECEDENTS WHICH UNIFORMLY SUPPORT MOVANT'S POSITION. THE FACTS AND DECISIONS CITED BY APPELLANT HAVE NO RELEVANCE ON THIS APPEAL.

1. While the appellant has relegated the decisions of the United States Supreme Court and other decisions cited by the District Court to the footnotes of its brief (App. Br. pp. 14-15), it is submitted that their pertinency to the issue here is in no way lessened. Throughout its brief, the appellant seeks to deprive the movant of even the right to a hearing at which it can prove its claims by the constant reiteration that "an unrecognized foreign government cannot acquire a claim to assets in the United States" (App. Br. p. 14). On the assumption that the movant is an unrecognized foreign government, it then constructs an argument which has not the slightest bearing on the issues. The movant indicated from the outset that it was ready to submit to the District Court the question whether it represented an unrecognized foreign government or the bona fide management of the Bank of China, its depositors, business clients and stockholders. This much is certain: the party plaintiff here, whom appellant purports to represent, is out of its own testimony the Bank of China, a private corporation. If, as the appellant states, "the Bank is a

vigorous existing institution'' (p. 14) then the issue before the District Court is not whether a suit or claim to assets can be made by an unrecognized foreign government, but whether the Bank of China is represented by movant or by the three emigres in New York having no contact with, and no responsibility to the flesh and blood reality that makes any bank a going concern.

The only individuals interested in immediately seizing the funds now in Wells Fargo are Messrs. Lee, Kung and Hsi Te-Mou.

Under such circumstances, the legal issue is not whether an unrecognized government can sue in the courts of the United States, but whether the acts and transactions which occur in a territory governed by a *de facto* regime can be disregarded by the courts of law whenever private claims are advanced. On this issue, it has been demonstrated by the decided cases that such facts cannot be ignored whenever they become material, and are always legally provable.

To distinguish the numerous decisions cited by the District Court, the appellant states (p. 14, note 4) that they dealt only with "the effect to be given by United States courts to transactions involving persons or property physically subject to the *de facto* control of the unrecognized government and later appearing in this country." Such a statement, which is not even correct factually, is clearly not evidence of any distinction. On the contrary, the appellant implicitly concedes away its entire thesis for it is compelled to admit that the Supreme Court and other American courts have constantly upheld claims based on acts

extended to the particular government then effectively in control. It concedes that the courts have recognized claims even when the assets appear in this country. In other words, appellant itself admits that in a factual situation as is presented on this appeal the courts have always treated the matter as a judicial question and not a question of political recognition by an executive arm of government.

To distinguish the decisive decision of *Russian Volunteer Fleet v. U. S.*, 282 U.S. 481, 51 S. Ct. 229 (1931), the appellant can only state (App. Br. p. 14, note 4 (2)) that that case involved the "effect of non-recognition upon claims asserted against the United States". There is not a single word in the Court's opinion to indicate that the Supreme Court's decision rested on any such tenuous basis. The real basis of the *Russian Volunteer Fleet* decision was that an alien corporation in existence and in operation under an unrecognized government (and despite the formal suggestion of the Secretary of State that the United States recognized another government) was entitled to recover assets belonging to it in the United States.

To distinguish the decision in *Wulfsohn v. R. S. F. S. R.*, 234 N.Y. 372, 138 N.E. 24 (1923) writ dismissed 266 U.S. 580, 45 S. Ct. 89 (1924), appellant states that that case only upheld the sovereign immunity of an unrecognized government (App. Br. p. 14, note 4 (3)). That case did more than decide the single question of immunity. It held that the existence in fact of a government is not dependent upon recognition; its existence may "be proved in other ways" (p. 375).

This Court will observe that appellant's main reliance is upon a decision of the New York Court of Appeals, *Petrogadsky etc. v. National City Bank*, 253 N.Y. 23, 170 N.E. 479 (1930), certiorari denied 282 U.S. 878 (App. Br. p. 15, *et seq.*). The paucity of decisions which appellant can marshal in its support is a measure of the validity of its position. Before discussing these decisions, it may be well to broadly examine the historical evolution of the principles herein involved.

As we have previously demonstrated, the Supreme Court from the inception of the Republic has enunciated the fundamental principle of international law that the continuity of the existence of a state requires the courts to consider the existence of a government and the acts and transactions which occur therein whenever such facts must be determined in a judicial inquiry, even if such government is unrecognized by the political arm of government. As to recognition, the Supreme Court has stated:

“(The political department’s) action in recognizing a foreign government and in recessing its diplomatic representatives is conclusive on all domestic courts which are bound to accept that determination, *although they are free to draw for themselves its legal consequences in litigations pending before them.*” *Guaranty Trust Co. v. United States*, 304 U.S. 126, 138; 58 S. Ct. 785, 791 (1938). (Emphasis supplied.)

Before the recognition of the Soviet Union in 1933, the problem arose as to whether its decrees nationalizing the banks and insurance companies which had

been in existence since the czarist regime, and confiscating their assets, were binding upon courts in the United States. Upon this question, the courts in New York (there were at least twenty-five decisions of which appellant has extracted one) were in much contradiction. Refusing at first to respect the acts of the new Russian government, the courts of New York finally began to hold that "to refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country, is to give to fictions an air of reality which they do not deserve." (*Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933)). Finally, when the Soviet Union was recognized and the decision of the Supreme Court was rendered in *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 552 (1942), the basic principles of law which had been promulgated from the beginning were reaffirmed. The *Pink* case involved the validity of an Executive Agreement (Litvinov assignment) which was contemporaneous with recognition of the Soviet Union. In this agreement, many of the claims of the nationalized corporations in Russia were assigned to the United States. The agreement was held binding on the courts in all forty-eight states and no local public policy could contravene it. Thus, in effect, the Supreme Court upheld the validity of the decrees of the Soviet Union which had gone into effect before recognition and impliedly overruled previous decisions of state courts which had held to the contrary. One of these decisions was the *Petrogradsky* case upon which the appellant relies so heavily. In a note in 139 American Law Reports 1209, it is stated:

“The decisions in the Belmont and Pink cases would also seem to overrule, or at least to throw strong doubt on, the other decisions of the New York courts refusing under various circumstances, to give any extraterritorial effect to the Soviet nationalization decrees. Such decisions, now of doubtful authority, are *Vladikavkazky Ry. Co. v. New York Trust Co.*, * * * decided upon the authority of *Petrogradsky* * * *” (p. 1219).

It is clear that appellant's main reliance upon the *Petrogradsky* case is misplaced. Moreover, the appeal here does not involve the nationalization of a bank or the expropriation of its assets. Nor is this a suit in the name of an unrecognized foreign government. There is not involved here the capacity of a foreign government to sue in an American court. There is only the question of whether the movant or appellant is the true agent of the only plaintiff in the action, the Bank of China, a private corporation. In *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 147 N.E. 703, the Court stated:

“Its rule may be without lawful foundation, but lawful or unlawful, its existence is a fact and that cannot be destroyed by juridical concepts. The State Department determines whether it will recognize its existence as lawful, and until the State Department has recognized the new establishment, the court may not pass upon its legitimacy or ascribe to its decrees all the effect which inheres in the laws or orders of a sovereign. The State Department determines only that question. It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign or with which our

government will have no dealings. That does not concern our foreign relations. It is not a political question, but a judicial question." (p. 158).

Even in cases where foreign corporations long dissolved were held to still continue as juristic personalities, the courts of New York always warned against any sweeping conclusions drawn from such decisions. Thus, in *James & Co. v. Second Russian Ins. Co.*, 239 N.Y. 248, 146 N.E. 369 (1925), the Court stated: "We do not say that a government unrecognized by ours will always be viewed as non-existent by our courts" (p. 256). In *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), the same Court reiterated: "* * * effect may at times be due to the ordinances of foreign government which, though formally unrecognized, have notoriously an existence as governments de facto" (p. 165). And in *Severnoe Securities Corp. v. L. & L. Ins. Co.*, 255 N.Y. 120, 174 N.E. 299 (1931), reargument denied 255 N.Y. 631, the Court of Appeals after distinguishing the *Petrogradsky* case as limited to its facts, held that surviving directors of one of the Russian nationalized corporations were without authority to act in its behalf." The Northern Insurance Company of Moscow dismembered by the decrees of the Russian Soviet Republic, retains a pallid life as the shade or little more of its former self" (p. 122).

The only other New York cases which the appellant can find its support are some lower court decisions like *Amstelbank, N. V. v. Guaranty Trust Co.*, 177 Misc. 548, 31 N.Y.S. (2d) 194 (1941) and related decisions (App. Br. p. 17). These decisions do not

aid the appellant. Indeed, they militate against its position. Those cases were decided on the basis of a procedural statute in New York, New York Civil Practice Act, Section 51-a. That section enabled a stakeholder to obtain an order permitting it to give notice of pendency of an action to any alleged adverse claimant to funds sought in a complaint. Interpreting the word "claim" strictly under the statute, the lower New York courts held that when "a question of agency" arose between two parties, that did not mean they were "adverse claimants" under Section 51-a of the Civil Practice Act.

What the appellant overlooks is that since the enactment of Section 287-g of the New York Civil Practice Act in 1948, the New York Legislature has expressly done away with the rule laid down in the *Amstelbank* and *Kownklyke* cases. This intention was noted by the Executive Secretary of the New York Judicial Council, who pointed out:

"Chapter 850 amended Section 51-a repealing sec. 4 and substituting new subdivisions 4 and 5. The two subdivisions extend the application of section 51-a to cases where two or more persons are acting for the same claimant and would change the holding of *Amstelbank, N. V. v. Guaranty Trust Co. of N. Y.* (177 Misc. 548, 31 N.Y.S. (2d) 194 (Sup. Ct. N.Y. Co., 1941) when it was held that the assertion of sole authority to act for a plaintiff was not a 'claim' under section 51-(a) but merely a question of authority" 20 New York State Bar Association Bulletin 216.

2. The appellant states that the decision in *The Denny*, 127 F. (2d) 404 (C.C.A. 3rd, 1942) "cannot

be accepted" (App. Br. p. 19) as authority in the light of the later decision by the same court in *The Maret*, 145 F. (2d) 431 (C.C.A. 3rd, 1944). Unfortunately for appellant, that is precisely what the Third Circuit did not hold. The *Maret* was a ship of Estonian registry which, while at the Virgin Islands was requisitioned by the United States Maritime Commission. The claimants to the funds were diverse foreign creditors, American creditors, various individuals and domestic and foreign corporations. At two points in its opinion (pp. 438 and 442), the Court pointed out, *after trial and a complete record*, that the unrecognized government was the real party claimant. The Court of Appeals stated (p. 439):

"The question presented by the facts of the case at bar, however, are different in essential respects from those which were before the courts in such cases as *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679, 89 A.L.R. 345; *Boncode Espana v. Federal Reserve Bank*, 114 F. 2d 438, 441-445, and *The Denny*, 127 F. 2d 404, decided by this court."

The Maret and related cases cited by appellant did not hold that the absence of recognition precludes a court from determining the rights of foreign nationals in accordance with the laws of the country which governs them. It held that an unrecognized government itself had no standing to make a claim against a ship to which diverse claims by foreign and domestic creditors had been made. To construe the case as holding that every alien corporation or individual citizen of an unrecognized government is without legal redress in the courts of this country,

regardless of the facts, is to disregard the Circuit Court's own distinctions and the overwhelming weight of authority. As Judge Goodrich stated in his concurring opinion (p. 444):

“When our government recognizes the government of a foreign country that recognition can be on such terms and conditions as are mutually agreed upon. These terms and conditions are binding because, representing action by the federal government in its constitutional field, they are the supreme law of the land. I find difficulty in seeing a parallel in the case of non-recognition which seems to me simply absence of recognition. But in the absence of recognition of the foreign government, it seems not improper, in a litigated matter, to deny effect to an act of that government which purports to change the ownership of a chattel many hundreds of miles away from its borders. Therefore I think the result reached is the correct one.”

The entire argument of Appellant (pp. 24-26) that the “Communists cannot be heard to assert a claim to appellant's deposits with Wells Fargo” rests on a fallacious basis. It is true that *no* foreign government comes to an American court as suitor, as a matter of right; its power to sue flows from the “comity” of nations, conferrable only by the Executive Department. Where the court has *found from the record before it* that an unrecognized government was the real party in interest, it has rejected the claim of a nominal plaintiff. In the instant case, however, the District Court had before it the positive proof from both appellant and movant that the real party in interest was the Bank of China and that there had been

no transfer of title or succession in interest. The appellant's convenient assumption that "movant" is the "People's Government" is unfounded. These are matters of fact, not to be disposed of by a statement of a brief.

3. Actually, as appears from appellant's argument on pp. 21-23 of its brief, its only attack is on the authority of the movant to represent the Bank of China. Its view is that even if the People's Republic of China is *in fact* a stockholder in the Bank of China under the Articles of Association and By-Laws of the Bank of China, its action together with the private stockholders in electing a new Board of Directors, and the Board's appointment of a new management, is all without validity because the People's Government is not recognized. Apparently, the appellant is of the view that the government of a state cannot become the possessor of stock in a private corporation unless its predecessor has made some formal assignment of the stock. The fact is, however, that "the courts of our country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252, 118 S.Ct. 83 (1897). If in fact, the People's Republic is a stockholder in the Bank of China (whether it is a revolutionary government or not) under the laws of China, then its action together with the private stockholders cannot be ignored. This is a question of fact which bears upon the primary issue of agency and that question still remains to be decided. "The official acts, laws, and decisions with rare exceptions, such as treaty rights, are to be deemed

valid," Brown, P.M., *The Legal Effects of Recognition*, 44 *American Journal of International Law*, 617-640, 639 (October 1950).

4. A final word may be stated concerning appellant's assurance that "a subsequent recognition of the Communists, even if it took place" could in no way "affect the validity of the prior payment to appellant" (App. Br. p. 12) citing *Guaranty Trust Co. v. United States*, 304 U.S. 126, 58 S.Ct. 785 (1938). However, there was a subsequent decision in *United States v. Guaranty Trust Co.* (reported sub nom *Steingut v. Guaranty Trust Co.*) 161 F. (2d) 571 (CCA 2nd, 1947). Involved in the second *Guaranty* case was not an account of the old government itself, but a deposit account in the name of the Nationalized Russo-Asiatic Bank. Before recognition, the refugee directors of Russo-Asiatic, meeting in Paris, had demanded repayment to themselves. Their action was still pending at recognition. As to the effect of their actions with respect to the account, the Circuit Court said unanimously (p. 573):

"As the deposits were debts payable on demand, nothing was due and payable until a demand. We agree with the trial judge that the demand of the refugee directors of the Russo-Asiatic Bank was not effective. Accordingly, no effective demand was made until the United States instituted the present actions."

If, as the appellant desires, the movant is excluded from the action without a hearing as to its authority to represent the Bank of China, and the demand of Kung, Lee and Hsi are subsequently found to have

been ineffective, there is no way in which Wells Fargo can avoid a subsequent suit by the Bank of China, or its assignees.

CONCLUSION.

It is respectfully submitted that the appeals from the orders of the District Court should be dismissed, or in the alternative, the said orders should be affirmed.

Dated, San Francisco, California,
March 30, 1951.

Respectfully submitted,
ROBERT W. KENNY,
MARTIN POPPER,
WOLF, POPPER, ROSS & WOLF,
BENJAMIN DREYFUS,
FRANCIS J. McTERNAN, JR.,
*Attorneys for Movant-Appellee
Bank of China.*

Nos. 12,698-99

IN THE

United States
Court of Appeals

For the Ninth Circuit

BANK OF CHINA, a Corporation, *Appellant*,
vs.

WELLS FARGO BANK & UNION TRUST CO., a
Banking Corporation, *Appellee*.

No. 12698

BANK OF CHINA, a Corporation, *Appellant*,
vs.

WELLS FARGO BANK & UNION TRUST CO., a
Banking Corporation, *Appellee*.

No. 12699

APPELLANT'S REPLY BRIEF

A. CRAWFORD GREENE
MORRIS M. DOYLE
OWEN JAMESON
1500 Balfour Building
San Francisco 4, California

JAMES B. BURKE
72 Wall Street
New York 5, New York

*Attorneys for Appellant
Bank of China.*

MCCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
1500 Balfour Building
San Francisco 4, California

BURKE & BURKE
72 Wall Street
New York 5, New York

Of Counsel.

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IN THE

United States
Court of Appeals

For the Ninth Circuit

BANK OF CHINA, a Corporation, *Appellant*,
vs.

WELLS FARGO BANK & UNION TRUST CO., a
Banking Corporation, *Appellee*.

No. 12698

BANK OF CHINA, a Corporation, *Appellant*,
vs.

WELLS FARGO BANK & UNION TRUST CO., a
Banking Corporation, *Appellee*.

No. 12699

APPELLANT'S REPLY BRIEF

THE ORDER APPEALED FROM IS APPEALABLE

The only defendant in this action is the Wells Fargo Bank & Union Trust Co. Paragraph 5 of the order appealed from (R. 108) provides that said defendant

"* * * is hereby relieved of any and all claims for interest for use of the fund or because of its failure or refusal to pay said fund to plaintiff Bank of China * * *"

Paragraph 6 of the order appealed from provides that said defendant

"* * * is hereby discharged of and from all liability in the premises either to plaintiff Bank of China or to anyone claiming through or on behalf of plaintiff, and plaintiff and all those now before this court who are assertedly acting in the name of plaintiff are restrained from enforcing or attempting to enforce any claim or claims against said defend-

ant relating to said sum of money or said deposit or from taking any proceedings against defendant in relation thereto;”

Thus, the only defendant in the case is discharged of all liability to plaintiff and relieved of all claims for interest, and plaintiff is enjoined from enforcing any claim or from taking any proceedings against defendant in relation thereto. It is difficult to imagine a more complete and final discharge of a defendant than that embraced in the foregoing provisions of the District Court's order. The order simply, cleanly and effectively takes the sole defendant right out of the case. This order is final, and therefore appealable, because

A. It finally discharges a contract debtor from an obligation to the plaintiff.

Bank of Taiwan v. Gorgas-Pierie Mfg. Co., 273 Fed. 660, 661 (C.C.A. 3, 1921)

“This appeal is from an order of interpleader. The plaintiff-appellee moves to dismiss the appeal on the ground that the order is not final. The order aligns the parties, prescribes the method of procedure, and—as it will presently be seen—*finally denies to one of the parties the right to assert a contract obligation against another.* We regard the order as final within the meaning of the statute, and, accordingly, deny the motion to dismiss the appeal.” (Citations omitted; italics added.)

B. It leaves the plaintiff in precisely the same position it would occupy upon the granting of a compulsory nonsuit—an order from which an appeal may be taken. *Restatement, Judgments* § 53, page 207; *Central Transportation Co. v. Pullman's Car Co.*, 139 U.S. 24, 39, 11 S.Ct. 478, 480, 35 L.Ed. 55, 61; *U. S. v. City Savings Bank & Trust Co.*, 73 F.2d 486 (C.C.A. 6, 1934); *Cyc. Fed. Proc.*, 2nd Ed., § 4875. The only difference is that here, because of the injunction, the plaintiff is precluded from bringing suit elsewhere.

C. It enjoins appellant from asserting or enforcing any claim against appellee. Even an interlocutory injunction is appealable.

28 U.S.C.A. § 1292; *Young v. Southern Pacific Co.*, 15 F.2d 280 (C.C.A. 2, 1926).

A motion denying remand is not appealable, but where it is coupled with an injunction against further proceedings in the state court, this Court will review both orders and where appropriate order a remand. *Albi v. Street & Smith Publication, Inc.*, 140 F.2d 310, 311 (C.C.A. 9, 1944).

Movant-appellee asserts (Brief, p. 34) that appeals from injunctions are limited to injunctions in equity suits. The statute (28 U.S.C.A. § 1292) contains no such limitation, and the case cited by movant-appellee does not so hold.¹ Precisely the same contention now made by movant was disposed of by the Court of Appeals for the Eighth Circuit in *Morgan v. Kroger Grocery & Baking Co.*, 96 F.2d 470 (1938). It was there held that an order entered after removal of a personal injury case enjoining further proceedings in the state court was appealable. The court said at page 472:

"* * * It is said that the appeal will not lie because the order was not issued in an equity suit. Formerly, this section 129, 28 U.S.C.A. § 227 note employed the following language: 'That where, upon a hearing in equity in a district court * * *.'

"The section, however, was amended, and there was eliminated from the above-quoted language the words 'in equity,' so that it now reads as follows: 'Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, * * * an appeal may be taken from such interlocutory order or decree to the circuit court of appeals.'

"There would seem to be no doubt that under section 129 the order was appealable. *Shanferoke, etc., Corporation v. Westchester Corporation*, 293 U.S. 449, 55 S.Ct. 313, 79

¹*Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454, 55 S.Ct. 475 (1935), simply held that an order staying the trial of a suit in admiralty pending arbitration between the parties was not an injunction and not appealable. The significance of this case is that an admiralty court *cannot* issue an injunction, except in certain enumerated cases. There was no such limitation on the District Court in this action. F.R.C.P. Rule 1, Compare Rule 81.

L.Ed. 583; Gray, *McFawn & Co. v. Hegarty, Conroy & Co.*, 2 Cir., 85 F.2d 516, 517 * * *."

Movant-appellee asserts also that the injunction herein was "merely an interlocutory order of a court of law controlling the progress of the litigation before it" (Mov. Br., p. 35). But this Court will observe that the order enjoins plaintiff-appellant "from taking any proceedings against defendant" in relation to the deposit. In other words, plaintiff-appellant could not dismiss its suit and commence another in the state court or elsewhere without contempt of court. This restraint plainly goes beyond mere control over the progress of the case before the court.

D. It amounts to sequestration of appellant's funds. The District Court had no judicial power to discharge the only debtor while denying recovery to the only claimant indefinitely. Such an order is appealable even though interlocutory. *DeBeers Mines v. United States*, 325 U.S. 212, 65 S.Ct. 1130 (1945). See also *Rubert Hermanos, Inc. v. Peo. of Puerto Rico*, 118 F.2d 752 (C.C.A. 1, 1941), *rev'd on other grounds*, 315 U.S. 637, 62 S.Ct. 771 (1942).

E. It denies the motions interposed by movant-appellee without prejudice, and a dismissal *without prejudice* is appealable by a defendant. *Cybur Lumber Co. v. Erkhart*, 247 Fed. 284 (C.C.A. 5, 1918); *Iowa-Nebraska Light & Power Co. v. Daniels*, 63 F.2d 322 (C.C.A. 8, 1933); *Cyc. Fed. Proc.*, 2nd Ed., § 4874.

F. It deprives plaintiff of all interest. It establishes the rights of the parties on this question and is, therefore, final and appealable. *Farmers' Loan & Trust Co.*, 129 U.S. 206, 215, 9 S.Ct. 265, 266-7 (1889); *Stokes v. Williams*, 226 Fed. 148, 152 (C.C.A. 3, 1915), *cert. den.*, 241 U.S. 681.

By virtue of the order appealed from, the only party defendant has been discharged from all liability for principal and interest to the only party plaintiff (movant-appellee is not, never has been and has never attempted to be a party).² In substance the order completely disposes of the case on *existing* facts and it was in-

²Movant came into the case with a procedurally anomalous motion. No effort was made to intervene because under Title 28 U.S.C.A. Sec-

tended to do so. Since substance not form is decisive, the order is appealable. *Dexter-Horton Nat. Bank v. Hawkins*, 190 Fed. 924, 926 (C.C.A. 9, 1911); *Potter v. Beal*, 50 Fed. 860, 863 (C.C.A. 1, 1892).

Appellant's claim was denied because the District Court erroneously believed that the *de facto* control of the Communists in continental China could have some effect on this San Francisco bank account. Movant's claim was nominally rejected by denial of its motion, but in reality that claim was given full recognition—appellant's bank account was blocked and it was deprived of its funds indefinitely without interest. Its account was frozen, not until existing facts could be discovered or collected but until the facts should change.

The rule that an appeal will lie only from "final" judgments and such interlocutory orders as are made appealable by statute is designed to prevent piecemeal review of litigation—taking cases to the appellate court "in fragments by successive appeals" (*Audi Vision, Inc. v. RCA Mfg. Co.*, 136 F.2d 621 at 624)—because this contributes to delay in the administration of justice. Denying appeal from the order before this court would serve no such purpose; the fundamental question in the case—whether the claims of an unrecognized government can have any effect upon this bank account in San Francisco—is ripe for review.

At the hearing on its motion, movant's counsel acknowledged that "Where this would appear to be an interlocutory motion, it

tion 1332, jurisdiction of the District Court extends only to controversies between "(2) citizens of a state, and foreign states or citizens or subjects thereof;" and a foreign state must achieve recognition by the United States Government before it or its citizens or subjects, *including its corporations*, may be suitors in the Federal Courts. See *Land Oberoesterreich v. Gude*, 109 F.2d 635, 637 (C.C.A. 2, 1940). This is most clearly illustrated by the fact that the attorneys here representing movant filed a complaint on April 27, 1950, on behalf of "Bank of China" to recover a deposit in the Citizens National Trust and Savings Bank of Los Angeles. But when the defendant there moved for a more definite statement, seeking a disclosure as to whether the plaintiff was a corporation existing under the National Government of China or the People's Government, the complaint was dismissed by Messrs. Popper et al., forthwith. *Bank of China v. Citizens National Trust & Savings Bank*, S.D. Cal. No. 11521-M. This Court may take judicial notice of what happened there. *Wells v. United States*, 318 U.S. 257, 260, 63 S.Ct. 582, 584 (1943).

is in fact a deciding factor in the case" (R. 340). He later added "But actually, it is a motion which tests the authority to act, and apparently, from the *Friedman v. Harris* case, it is itself an appealable motion" (R. 342).

The District Court recognized that the issue before it was one of law. That issue was briefed and the court decided it. Its order gave effect to the Communist claims by denying appellant its funds and discharging defendant free from all interest. The order assumed that no facts which any of the parties might present would change the result. It was a final order.

THE WELLS FARGO BRIEF

Wells Fargo, with an obvious obligation to pay its depositor, argues chiefly that it should be relieved of interest, and supports that argument with allegations of uncertainty as to the authority of appellant's officers and recitals of risks of double liability. Wells Fargo ought to be saying what is obviously true: That it has no claim to the monies left with it by appellant and that unless the Communists are entitled to those monies Wells Fargo is willing and, indeed, anxious to make prompt payment to appellant.

A. Wells Fargo Is Liable to Appellant for Interest.

1. The District Court relieved Wells Fargo from liability for any interest whatsoever. This was an unexpected windfall. Such relief was not argued for by anybody. On the contrary, Wells Fargo counsel said to the District Court "* * * we are paying a penalty in interest if the trial is delayed, but we think that penalty is worth getting a full, clear determination of all the issues" (R. 372). To retain this unforeseen relief, counsel now advances the startling proposition (Wells Br. 14) that "A continuance requested by a party suspends his right to receive interest during the delay occasioned thereby," and *Rasmusson v. Nat. Popsicle Corp.*, 105 F.2d 759 (C.C.A. 9, 1939) is cited in support thereof. But the *Rasmusson* case was one where the party seeking the continuance *stipulated* to forego interest in considera-

tion of the postponement. It has no application here and, of course, there is no such rule as that embraced within the proposition asserted.

There is a statutory right to interest, Calif. Civil Code §§ 3287, 3302, supported by the cases previously briefed (Op. Br., p. 11). The question of the right to interest on this deposit is governed by California law. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1941); *Perkins v. Benguet Cons. Min. Co.*, 55 C.A. 2d 720, 768, 132 P.2d 70, 98 (1942), *cert. den.*, 319 U.S. 774, 320 U.S. 803; *Nesbit v. MacDonald*, 203 Cal. 219, 263 Pac. 1007 (1928). The mere existence of a dispute between two claimants cannot relieve the defendant of liability for interest. *Perkins v. Benguet Cons. Min. Co.*, *supra* at 766, 132 P.2d at 97 (1942); *Conner v. Bank of Bakersfield*, 183 Cal. 199, 190 Pac. 801 (1920). A deposit in court erroneously permitted by a lower court does not stop the running of interest, and such deposit is improper where the debtor's only reason for refusal to pay is an erroneous view of the law. *Pfister v. Wade*, 56 Cal. 43, 51 (1880), 69 Cal. 133, 141, 10 Pac. 369, 373 (1886).

The purpose of interest is not to inflict punishment on Wells Fargo, but to provide compensation to appellant because it has been deprived of the use of its funds. See *United States v. Los Angeles Soap Co.*, 153 F.2d 320, 322 (C.C.A. 9, 1946).

2. Under *Guaranty Trust Co. v. United States*, 304 U.S. 126, 58 S.Ct. 785 (1938) and other cases cited in appellant's opening brief, Wells Fargo could and should have paid appellant, its depositor, with impunity and without reasonable fear of double liability.

3. Under California Banking Code Section 952,³ Wells Fargo could and should have ignored the Communist claim. Like similar statutes in other states recommended by the American Bankers Association (see *Gendler v. Sibley State Bank*, 62 F. Supp. 805, N.D. Ia., 1945), it was drafted for the protection of bankers against adverse claims. It provides that notice to any bank of an adverse claim (e.g., the cables from Shanghai to Wells Fargo

³The text of the section is set forth in the appendix hereto.

dated June 25, 1949 (R. 134), June 29, 1949 (R. 138), and July 21, 1949 (R. 140)) to a deposit standing on its books may be disregarded until and unless the adverse claimant shall either procure and serve upon the bank a restraining order or execute and deliver to the bank a bond of indemnity. No bond or restraining order was presented to Wells Fargo in this instance. Three of its vice-presidents (R. 116, 144, 150) and its attorney (R. 330) all acknowledged that but for the adverse claims asserted in the Communist cablegrams from Shanghai there was no question as to appellant's right to the deposit. Now its counsel says "Appellee could not interplead at an earlier date because one of the *two conflicting claimants* was not within the jurisdiction of the court" (Wells Br., p. 6; emphasis supplied). If there were two conflicting claimants, why interplead? What is Section 952 for?

Wells Fargo knew that Bank of America had paid, but regretted that it could not take "similar action" (R. 126). Under these circumstances, why should Wells Fargo be gratuitously relieved from interest? One bank pays and avoids interest; the other refuses to pay yet incurs no liability for interest. Such cannot be the result for that would make it a matter of indifference to the law whether the depository's obligation is honored or not.

B. The Simulated Issue of Authority Is Spurious.

For many years before receipt of the Communist cablegrams from Shanghai in June, 1949, Wells Fargo had permitted withdrawals from the Bank of China account upon request of those who made the request in this instance (R. 144, 145). Until those cablegrams were received there was no question about their authority (R. 116, 144, 150). Indeed, *after* receipt of the cables Wells Fargo's Vice-President Hellman cabled to R. C. Chen suggesting transfer of the Shanghai account to "Bank of China, Foreign Department, Hongkong," (R. 120) and later wrote as follows (R. 122):

June 29, 1949

Air Mail
 Mr. R. C. Chen,
 Bank of China,
 Hongkong, Hongkong.

Dear R.C.:

This will acknowledge receipt of your wire of June 28, and in accordance with your instructions, under separate advice, we have transferred your Shanghai account to a new account reading — 'Bank of China, Foreign Department, Hongkong.' We thought it best to advise this move in case the Communists took some legal means to tie up these funds although I admit it is rather far-fetched as I do not believe they would have any standing in court in this country.

Hoping that you and Mrs. Chen are well, and with kindest personal regards,

Sincerely yours,

Certainly Hellman had no question about the authority of those with whom he dealt and he could see no merit to the Communist claim. After these suits were filed he said that he was acting without advice of counsel (R. 74).

With this record Wells Fargo cannot be heard to say that those who acted for appellant were not authorized to do so. Obviously, Wells Fargo's officers did not really believe as a matter of fact that the Communists in Shanghai had become bona fide officers of its depositor the Bank of China.

Moreover, as a matter of law, the authority of the incumbent officers and directors could not be questioned collaterally. See *Spellman, Corporate Directors* 252 (1931); *Consumers Salt Co. v. Riggins*, 208 Cal. 537, 542-543, 282 Pac. 954 (1929); *Cons. Interstate C. M. Co. v. Callahan M. Co.*, 228 Fed. 528, 530 (D. Ida., 1915); *Weitz v. Preston*, 113 N.J.L. 271, 174 Atl. 429 (1934); *Mining Co. v. Anglo-Calif. Bank*, 104 U.S. 192, 26 L.Ed. 707 (1881).

Even the Communists acknowledge that the New York Agency is a part of the corporate entity of Bank of China (R. 90). Hence, independently of California Banking Code Section 952, the *Guaranty Trust* case, and the other authorities upon which appellant

relies, payment to the New York Agency in accordance with the demand made (R. 261) would have discharged Wells Fargo.

In order to bring to the Court's attention matters of which it may take judicial notice, we file with this reply brief a duly attested certificate of the Minister of Finance of the National Government of the Republic of China, executed at Taipeh, Taiwan, on March 23, 1951, (Appendix p. 6) certifying, amongst other things, that the National Government of the Republic of China is the owner of two-thirds of the capital stock of Bank of China and that, according to the records of the Ministry of Finance, Hsi Te-Mou is the general manager of said bank under Article XXV of its By-Laws; that the National Government is advised of the pendency of these actions, that they were instituted by the Bank of China through its duly authorized officers, and that the National Government as majority stockholder ratifies and approves the institution of said actions by appellant.⁴ Bound together with said certificate, by the seal of the Embassy of the United States of America at Taipeh, is an affidavit of the Chief Secretary of Bank of China (Appendix p. 2) certifying to resolutions of the Board of Directors of Bank of China, both in English and Chinese, for the removal of the Head Office from Shanghai, and a certificate of the Finance Minister of the National Government (Appendix p. 7) certifying to certain Government directives, both in English and Chinese, issued to the Bank of China for the removal of the Head Office. Copies of these certificates and affidavit, together with the English but without the Chinese version of the exhibits attached thereto, are set forth in the appendix to this brief.

The certificate of the Finance Minister respecting the authority of Hsi Te-Mou under Article XXV of the By-Laws of the Bank of China (R. 206) should put an end to the spurious issue of lack of authority.

⁴Under California Corporations Code Section 6602 the Court shall take judicial notice of the Constitution and statutes applying to foreign corporations, and any interpretation thereof, the seals of State and state officials and notaries public, and of the official acts affecting corporations of the legislative, executive and judicial departments of the State or place under the laws of which the corporation purports to be incorporated.

C. The Bugaboo of Double Liability.

There are throughout Wells Fargo's brief repeated references to its dread of double liability. Judge Cardozo thought that "the chance of double payment is a common risk of life," *Petrogradsky M. K. Bank v. National City Bank*, 253 N.Y. 23, 170 N.E. 479, 485 (1930), *cert. den.*, 282 U.S. 878. We do not advocate that Wells Fargo be exposed to double liability, but appellee cites no case wherein double liability was imposed. Nor is any case cited in which a transaction with a recognized government or a corporation owned by such a government was upset even after subsequent recognition of another government. Wells Fargo would espouse a rule whereby, whenever and wherever there is a revolutionary movement of uncertain but promising durability, all transactions with nationals of that place are to be frozen to abide the *eventual* outcome five, fifteen or many years later (Wells Br. 27-28). A better rule has been established by the *Guaranty Trust*, *The Maret*, the *Petrogradsky Bank* and other cases cited in our opening brief. Under them, Wells Fargo could safely pay the corporation controlled by that government of China which our State Department has determined to be the only lawful government of China, and could safely ignore claims emanating from the unrecognized government. It could safely pay under California Banking Code § 952. It could also safely pay the New York Agency of its depositor no matter what the situation in the Orient might be. And we insist that in any case it may safely pay under a judgment of this Court.

MOVANT'S BRIEF

A. The "Record" as Handled by Movant.

Movant would have the Court believe that the Bank of China continues to operate in continental China under the same board of directors that controlled its affairs before the Communist occupation of Shanghai (Mov. Br. 37), that a majority of the stock is owned and "in the possession of" the Communist government (Mov. Br. 37, 78), and that the balance of the stock is owned by private persons "in China" (Mov. Br. 37, 54). The record

supports none of this. By movant's own account banking operations, if any, on the continent are now being directed by Communist government appointees (R. 93-4), and only two directors elected by private stockholders have gone over to the Communists (R. 92). The Communist Government does not claim to have the stock certificates (R. 93), if indeed this made any difference. The record does not show where the private stockholders are. It shows only that they are scattered (R. 170) and that the Communists have purported to expropriate the stock of "war criminals" (R. 90, 92), and that twenty-one of the twenty-five duly elected directors, representing sufficient stock to be elected to the board, are outside Communist territory and the whereabouts of two more is unknown (R. 183).

Elsewhere in its brief, movant finds it more convenient to speak of a "new board of directors" (Mov. Br. 59-60, 78), but the cables upon which movant relies state only that board authority has been exercised by the Financial and Economic Affairs Commission of the People's Government (R. 94).

It is said that "There is no evidence in the record of a head office in Formosa nor the conduct of banking operations there" (Mov. Br. 64). The Court will find such evidence in the record at pp. 298, 282-3. It is said that Dr. Kung "had not even been connected with the Bank since April 30, 1948" (Mov. Br. 56), but the record shows that, while he is no longer Chairman of the Board, he is still a Managing Director (R. 155, 167, 183).

Movant's recurring insistence that the demands for these funds and the present law suit did not originate with the duly authorized officers of the Bank of China is based on nothing more of substance than its position that the Communists had power to discharge officers of the bank who were loyal to the National Government. But movant generally refuses to acknowledge this, asserting or implying that these officers had been discharged or their authority revoked by appellant itself (Mov. Br. 56-7, 59-60, 19, 22, 38-9). The record shows that the initial demand on Wells Fargo came from the Foreign Department in Hongkong (R.

261),⁵ directing Wells Fargo to remit funds to the New York Agency (R. 261). There is no dispute that this demand came in usual form from officials with whom Wells Fargo had long dealt on cordial and personal terms (R. 114-16, 122, 131, 149-50). When Wells Fargo refused to respond, the General Manager of the Bank and the Manager of the New York Agency, after reporting to the Head Office in Formosa directed suit to be brought (R. 264, 283). Thus the action was not instituted "solely on the basis of a power of attorney * * * to one Tuh-Yueh Lee" (Mov. Br. 55, 6-7), nor "solely on the instigation of Kung and Hsi Te-Mou in New York" (Mov. Br. 56-7), although either Hsi or Lee certainly had ample authority. Indeed, the attack on appellant's internal authority by both movant and Wells Fargo is only a sham. Every attempt in that direction can be met simply by reference to the certificate of the Minister of Finance of the National Government certifying that Hsi Te-Mou is the General Manager of the Bank (R. 300). He is authorized to "manage the affairs of the whole Bank" (By-Law XXVIII, R. 207), and he directed the commencement of this suit.

It now appears from the certificate filed herewith that the recognized Government of China, owner of two-thirds of the stock, knows of these actions and expressly ratifies them (Appendix p. 6). Thus nothing is left of the argument, which was always patently sham anyway, that there was something the matter with the authority of those who acted for appellant, *independently* of the Communist claim.

B. Movant's Legal Position.

The legal effect of the Communist claim is the only bona fide issue here. The only real question before this Court is: *Does the fact of control of large portions of Chinese territory, including the former Head Office building of the Bank of China in Shanghai, in and of itself entitle the People's Government to control over the Bank of China so that officers appointed by that govern-*

⁵After the Head Office moved from Shanghai, the Foreign Department operated for a time from Hongkong (R. 58, 270, 255).

ment have the right to control these bank deposits in San Francisco? We submit that the existence of the People's Government and the fact of its control in continental China are wholly irrelevant.

To support its position Movant relies upon three facts all of which may be conceded for the purposes of argument:

- (1) That it is operating a bank in China, called Bank of China, in buildings once occupied by appellant.
- (2) That the People's Government exists in and controls most of continental China.
- (3) That the Bank of China is a private corporation.

These facts, when taken separately or added together, do not support movant's conclusions.

1. MOVANT IS NOT THE BANK OF CHINA.

Movant suggests it is operating as a Bank of China in buildings once owned by appellant, under the name Bank of China. But by occupying the Bank's abandoned buildings, it did not thereby become the corporate entity Bank of China. That was moved, in fact (R. 194-5) and legally (R. 298). The Bank of China now has its Head Office in Formosa and operates an agency in New York City. Movant cannot crawl into the corporate skin of the Bank of China while appellant is still there.

2. THE COMMUNIST GOVERNMENT DOES NOT OWN THE BANK OF CHINA.

Movant reiterates that this Court cannot ignore the existence of the People's Government. We submit, however, that the existence of that government is irrelevant in this case. The question is not whether that government exists but whether persons appointed by it are authorized officers of the Bank of China.

Movant claims that it and not appellant is the Bank of China, a private corporation. Its authority to appear here comes from persons who claim to be officers of that corporation (R. 78-9, 92-4). But they were appointed by the Communist armies, not by the directors of the corporation, or by any persons claiming to be directors (R. 140). Nothing in the record indicates that

they represent the private shareholders, and certain it is that they do not represent the recognized Government of China, which owns two-thirds of the shares.' Hence movant claims through those who are unauthorized except by appointment of the unrecognized government. An unrecognized government cannot by seizure obtain the right to control a corporation and its affairs: the courts have unanimously held that expropriation of a foreign private corporation by the unrecognized government of its homeland has no effect upon corporate assets here. *Petrogradsky M. K. Bank v. National City Bank of N. Y.*, 253 N.Y. 23, 170 N.E. 479 (1930), *cert. den.*, 282 U.S. 878; *The Maret*, 145 F.2d 431 (C.C.A. 3, 1944); see also cases cited in opening brief pages 16-19. That was true when the recognized government was reduced to a fiction only and the corporation was factually extinct in its homeland. It is even more true when, as here, the corporation is alive and has the active support of a functioning government recognized by the United States.

Movant would avoid these decisions by asserting that there has been no expropriation, in spite of its own claim that it has "taken over" (R. 90) the stock of the National Government and certain "war criminals" (R. 92). But if there has been no seizure, upon what does movant's claim rest? Two-thirds of the stock of the Bank of China is owned by the Government of China. For years this stock has belonged to and been voted by the National Government, the government now recognized by the United States as the Government of China. Movant pleads that this Court cannot ignore the *de facto* existence of the Communist Government. Neither can the Court ignore the continued existence, both *de facto* and *de jure*, of the National Government. Our Government treats the National Government as *the* Government of China and recognizes it as the owner of Chinese Government property in American territory. At the same time, American armies are at war with the armies of Communist China. Our foreign policy would be subverted were this Court to treat this adversary government as owner of the Bank of China stock, thereby allowing it, through its appointees, to control this bank deposit.

In the cases cited by movant the *de facto* existence of the unrecognized government was material. Those courts were dealing with acts of that government done in its own territory to persons and property over which it had physical control. These cases, which we shall discuss presently, do not apply to this situation. Here, not only had the Bank of China itself moved beyond the control of the unrecognized government, but the property in question was a bank deposit in the United States. No case cited by movant (with the possible exception of *The Denny*, which we discuss *infra*) holds that a court in the United States, by its own decree, will extend the power of an unrecognized government to property situated in the United States which that government cannot reach without the court's aid.

When property in the United States is in issue, the decisions cited in appellant's opening brief (pp. 14-19, 22-23) are applicable, for they establish that the power of an unrecognized government is limited to its own territory. *Guaranty Trust* (304 U.S. 126) holds that a foreign government deposit in an American bank belongs to the recognized government and not to the *de facto* regime. *Petrogradsky Bank* (170 N.E. 479) holds that seizure of a corporation by the unrecognized government gives that government no power over assets of the corporation in this country. *The Maret* (145 F.2d 431, Mov. Br. 76) and *The Florida* (133 F.2d 719) establish that when an unrecognized government sets up a private corporation which asserts rights to property here, the unrecognized government is the real party in interest and the claim is denied. *Republic of China v. Merchants' Fire Assur. Corp.*, 30 F.2d 278 (C.C.A. 9, 1929), demonstrates that an unrecognized government in actual control of Chinese territory is not entitled to Chinese government funds in the United States.

In re Grauds Estate (41 N.Y.S.2d at 267-8, 59 N.Y.S.2d 710) permits only the recognized government, even though deposed, to appear before the court here to represent foreign nationals who have property here but whose persons are under the control of the unrecognized government. *Latvian State Cargo* (80 F. Supp.

683) gave summary judgment against the claim of a corporation created by the unrecognized Latvian Government which sought the insurance proceeds of ships belonging to Latvian citizens. *Amstelbank* (31 N.Y.S.2d 194) and *Koninklijke* (30 N.Y.S.2d 518) ordered depository banks to ignore claims to corporate funds asserted from occupied territory.⁶ *A/S Merilaid* (71 N.Y.S.2d 377) ordered a depository bank to repay deposits to a foreign corporation which had moved to another foreign nation prior to conquest by the unrecognized government.

In each of these cases recognition was decisive. The issue was not whether a *de facto* government could enter into treaties or send diplomatic representatives to this country, as movant intimates. In each case disposition of property in the United States was before the court. In each, recognition was the factor which determined to whom the property should go. The dictum in *Guaranty Trust* (304 U.S. at 138), cited by movant at page 71 and by Wells Fargo at page 27, means only that a court must always determine whether or not recognition is decisive in the case before it. *Guaranty Trust* holds that recognition is decisive when title to property depends upon which government is the government of a nation. Since the National Government is the Government of China, it is the owner of two-thirds of the Bank of China's stock. The officers and directors who were elected at the regular 1948 shareholders' meeting (R. 237-8) for a term of four years (By-Laws, Art. XXIX, R. 207) and are now endorsed by the National Government, are entitled to control the affairs of the Bank, including this deposit.

3. MOVANT'S AUTHORITIES ARE INAPPLICABLE.

Of the many cases cited by movant, some of which are also cited by Wells Fargo, most hold only that control by an unrecognized government in its own territory is accepted and its acts there have the effect of law. *M. Salimoff* (186 N.E. 679,

⁶The New York statutory changes to which movant refers (Mov. Br. 75) were procedural only, and did not touch that part of these two cases which decided that claims based upon acts of an unrecognized government and asserted by its appointees have no effect on corporate deposits here.

Mov. Br. 48) held that an American company which purchased oil from lands confiscated by the unrecognized government had committed no tort. *Banque de France* (33 F.2d 202, Mov. Br. 49) refused to impose liability on an American bank which purchased gold seized in Russia by the unrecognized regime. The Civil War cases (Mov. Br. 41) upheld the validity of some of the internal acts of some of the states of the Confederacy, such as property transfers and divorces (although acts furthering the rebellion were never sanctioned). *Underhill v. Hernandez* (168 U.S. 250, Mov. Br. 44, 78) denied damages to an American who was temporarily refused permission to leave territory controlled by the then unrecognized government. These cases have no application to this case involving bank deposits in San Francisco owned by a corporation which still exists as a going concern under the recognized Government of China.

Russian Volunteer Fleet (282 U.S. 481, Mov. Br. 39, 44) held that a Russian private corporation did not lose its claim against the United States because the recognized government at its domicile was supplanted by an unrecognized one. Unlike movant's claim, the claim there was not founded upon the change of government, nor was it asserted adversely to the rights of the established *de jure* officers and directors of the corporation.

The Denny (127 F.2d 404, Mov. Br. 50, 75-6) held that a United States court could not disregard a power of attorney signed by the owners of the ship in question without sufficient evidence of duress or inadequate authentication. *The Maret* (145 F.2d at 440, n. 38), a later decision by the same court, explains *The Denny* in that way. To the extent that *The Denny* supports movant, it has been effectively overruled by *The Maret*.

The *Wulfsohn* case (138 N.E. 24, Mov. Br. 70) shows that existence of a government may be proved in ways other than recognition, but it does not hold that such existence is material in a case such as this. It holds only that an unrecognized government has sovereign immunity.

Eastern States Petroleum (28 F. Supp. 279, Mov. Br. 50) accepted as valid the expropriation by the Mexican Government

of oil lands within its territory. If in point at all, this case demonstrates that neither movant nor appellee can question the validity of the Bank of China's move from Shanghai to Formosa since the move was ordered by the National Government (R. 194-5; Appendix p. 9 et seq.), a recognized government in actual control of Shanghai at the time.

Russian Reinsurance Co. v. Stoddard (147 N.E. 703, Mov. Br. 73) held only that when there was no existing recognized government of Russia, the New York courts would not take jurisdiction of a suit in the name of a Russian corporation brought by directors whose terms had expired and who sat in a nation which recognized the Russian decrees expropriating the corporation. The *Sokoloff* (145 N.E. 917), *Severnoe* (174 N.E. 299) and *Fred S. James* (146 N.E. 369) cases (Mov. Br. 74) are so clearly inapplicable that they merit no discussion.

In its attempt to show that Wells Fargo may be doubly liable, movant quotes from *Steingut v. Guaranty Trust Co.* (Mov. Br. 79, cited as *United States v. Guaranty Trust Co.*), 161 F.2d 571 (C.C.A. 2, 1947). But movant fails to point out that the Court of Appeals was merely agreeing with the District Court that the demand by the corporation's directors was ineffective to start interest running in favor of the United States whose claim was predicated upon Soviet expropriation and was adverse to the directors' claim. The case in effect acknowledges the *Guaranty Trust v. U. S.* (304 U.S. at 140) rule that completed transactions, unlike mere demands, are not upset by subsequent recognition.

Movant's authorities are easily summarized. In many circumstances courts must acknowledge the *de facto* existence of an unrecognized government. But courts in the United States will not extend the power of such a government to persons, property or corporations over which that government has no physical power.

The China Aid Act of 1948 (62 Stat. 158, 22 U.S.C. § 1541-46) and the China Area Aid Act of 1950 (64 Stat. 202, 22 U.S.C. § 1547) made United States funds available for the economic aid of China in areas not under Communist control. While United States funds are thus made available to Nationalist China, other funds deposited here by a corporation controlled by the

National Government should not be turned over to the unrecognized Communist Government nor frozen indefinitely, as was done by the District Court (R. 384). The freezing of foreign assets is an executive, not a judicial, function. (Compare Treasury Department Order Freezing Chinese Communist Assets in the United States, 15 Fed. Reg. 9040 (1950), 31 Code Fed. Reg., Sec. 500.101 et seq.) It follows that Wells Fargo is liable to appellant for the full amount of the deposits plus interest and costs.

Respectfully submitted,

A. CRAWFORD GREENE
MORRIS M. DOYLE
OWEN JAMESON
JAMES B. BURKE

*Attorneys for Appellant
Bank of China.*

MCCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
BURKE & BURKE
Of Counsel.

(Appendix follows)



Appendix

CALIFORNIA BANKING CODE SECTION 952

§ 952. **Notice of adverse claim to deposit: When may be disregarded: Notice that fiduciary about to misappropriate deposit: Application of § 953: Authority by depositor to another to make withdrawals.** Notice to any bank of an adverse claim (the person making such adverse claim being hereinafter in this section called "adverse claimant") to a deposit standing on its books to the credit of or to personal property held for the account of any person may be disregarded until and unless the adverse claimant shall (a) procure and serve upon the bank at the office at which the deposit is carried or the property held a restraining order, injunction, or other appropriate order against the bank from a court of competent jurisdiction in an action in which the adverse claimant and all persons in whose name such credit stands or for whose account such property is held are parties; or (b) execute and deliver to the bank at the office at which the deposit is carried or the property held a bond in form and with surety acceptable to it and in an amount fixed by the bank, but which amount in no event need be more than twice the amount claimed if the adverse claim is made against a deposit, nor more than twice the market value of the entire property against which the adverse claim is made if the claim is made against property, indemnifying it and also all persons in whose name such credit stands or for whose account such property is held, against all liability, loss, damage, costs, and expenses arising out of the refusal to permit withdrawal from such account or to deliver such property or arising out of the dishonor of checks, notes, or other instruments requiring payment of money by or for the account of the person to whose credit the account stands on the bank's books. Unless such restraining order, injunction, or other appropriate order is obtained, or such bond is given, the bank, notwithstanding such notice, may honor the

checks, notes, or other instruments requiring payment of money by or for the account of the person to whose credit the account stands or may deliver such property to, or on the order of the person for whose account such property is held, without any liability on the part of the bank. If an adverse claimant delivers to the bank at the office at which the account is carried or the property held his affidavit stating that of his own knowledge the person to whose credit the account stands or for whose account the property is held is a fiduciary for the adverse claimant and that such fiduciary is about to misappropriate the deposit or the property and stating the facts upon which the claim of a fiduciary relationship is based, the bank may refuse payment of the deposit or may refuse to deliver such property until the adverse claim is finally adjudicated or released, without liability on its part and without liability for the sufficiency or truth of the facts alleged in the affidavit. The provisions of this section shall be applicable even though the name of the person appearing on the bank's books to whose credit the deposit stands or for whose account the property is held is modified by a qualifying or descriptive term such as "agent," "trustee," or other word or phrase indicating that such person may not be the owner in his own right of the deposit or property.

BANK OF CHINA

Head Office

Taipeh

AFFIDAVIT OF CHIEF SECRETARY OF BANK OF CHINA

Republic of China

City of Taipeh, Taiwan—ss.

KUN-FAN CHEN, being first duly sworn, deposes and says: That he is, and ever since the twenty-eighth day of December, 1949, has been the duly elected and acting Chief Secretary of BANK OF CHINA, a corporation. That as Chief Secretary of said

corporation he is the custodian of the minutes of meetings of the directors of said corporation.

That annexed hereto and authenticated by the seal of the corporation are full, true and correct copies of resolutions contained in said minutes and adopted by the Board of Directors of BANK OF CHINA at meetings held on April 16th, 1949, September 1st, 1949 and December 22nd, 1949, together with correct English translations of the same.

/s/ KUN-FAN CHEN

(Seal of the
Embassy of the
United States
of America)

(Seal)

Island of Taiwan
City of Taipei
Embassy of the United
States of America—ss.

Subscribed and sworn to before me, Charles H. Pletcher, Vice Consul of the United States of America at Taipei, Taiwan, duly commissioned and qualified, this 2nd day of April, 1951.

/s/ CHARLES H. PLETCHER

Charles H. Pletcher
Vice Consul of the United States of America

Service No. 1386

[\$2.00 American Foreign Service
Fee Stamp affixed and cancelled.]

BANK OF CHINA

Head Office

"F"

TRANSLATION

COPY OF RESOLUTION ADOPTED BY BOARD OF DIRECTORS OF
THE BANK OF CHINA AT A MEETING HELD IN SHANGHAI
ON APRIL 16TH, 1949, AT 4 O'CLOCK P.M.

"Be it resolved that pursuant to confidential order No. 845 and
Directive Reference Characters Chai Chien Hu [Chinese char-

acters] No. 95 successively received from the Ministry of Finance of the National Government, the Head Office and the Foreign Department of the Bank be forthwith removed respectively to Canton and Hongkong; and that General Manager Hsi Te Mou be and is hereby authorized and empowered to cause the said Head Office and said Foreign Department to be so removed and to do or cause to be done all things necessary or requisite in the premises."

(Sgd) SUNG HAN CHANG

Sung Han Chang, *Chairman*

Seal

(Sgd) T. C. TAI

T. C. Tai, *Chief Secretary*

BANK OF CHINA

Head Office

"D"

TRANSLATION

RESOLUTION ADOPTED BY THE BOARD OF DIRECTORS OF THE BANK OF CHINA HELD IN CANTON AT 10 O'CLOCK ON THE FIRST DAY OF THE NINTH MONTH OF THE 38TH YEAR OF THE REPUBLIC (SEPTEMBER 1, 1949).

"WHEREAS a confidential directive Reference Characters Chai Chien Huei No. 3071 dated the 20th day of the 8th month of the 38th year (August 20, 1949) was received from the Ministry of Finance ordering that forthwith preparations be made to have the Head Office of the Bank removed to Chungking together with the National Government and to have the Foreign Exchange Department concerned remain as yet in Hong Kong and in the event of any difficulty arising to have the said department removed to Taiwan.

BE IT RESOLVED that pursuant to the said directive the Head Office of the Bank be and is hereby authorised to attend to its

removal as ordered and to cause to be done all necessary things in connection therewith."

/s/ SUNG HAN-CHANG
Sun Han-Chang, *Chairman*

/s/ T. C. TAI
T. C. Tai, *Chief Secretary*

BANK OF CHINA
Head Office

"D"

TRANSLATION

RESOLUTION ADOPTED BY THE BOARD OF DIRECTORS OF THE BANK OF CHINA HELD IN HONGKONG AT 5 O'CLOCK ON THE TWENTY SECOND DAY OF THE TWELVETH MONTH OF THE 38TH YEAR OF THE REPUBLIC OF CHINA (DECEMBER 22TH, 1949).

"WHEREAS the Head Office of the Bank, in accordance with a directive Reference Character Tai (38) No. 0189 dated the 10th day of the 12th month of the 38th year (December 10th, 1949) from the Executive Yuan ordering that the Head Office of the Bank be removed immediately to Taipeh, was so removed to Taipeh on the fourteenth day of the twelveth month of the 38th year (December 14, 1949).

BE IT RESOLVED that the said removal is hereby approved unanimously."

/s/ P. Y. HSU
Hsu Pei-Yuan, *Chairman*

MINISTRY OF FINANCE

Republic of China

Taipeh, Taiwan

China

I, C. K. YEN, Finance Minister of the National Government of the Republic of China, do hereby certify that as such Minister I have general supervision and control over institutions incorporated by special charter of the National Government of the Republic of China, that according to the records of the Ministry of Finance, Bank of China is a corporation duly organized, existing and in good standing under the laws of said government and the head office of said corporation is now located in Taipeh, Taiwan, China.

I further certify that the National Government of the Republic of China is the owner of two-thirds of the capital stock of Bank of China and that, according to the records of the Ministry of Finance, HSI TEH-MOU is the General Manager of said bank under Article Twenty-five of its by-laws. I further, certify that the National Government of the Republic of China is advised of the pendency of certain actions entitled "BANK OF CHINA, a corporation, Appellant, v. WELLS FARGO BANK & UNION TRUST Co., a Banking Corporation, Appellee" in the United States Court of Appeals for the Ninth Circuit, and numbered 12698 and 12699 in the files and records of said Court. I certify that said actions were instituted by Bank of China through its duly authorized officers, and further that the National Government of the Republic of China, as majority stockholder, ratifies and approves the institution of said actions by Bank of China.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Taipeh this twenty-third day of March, 1951.

(Seal)

/s/ C. K. YEN

I, GEORGE K. C. YEH, Minister of Foreign Affairs of the National Government of the Republic of China, do hereby certify that the

signature affixed above is the genuine signature of C. K. YEN who was at the time of signing and is now the Finance Minister of the Government of China.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this twenty-third day of March, 1951.

(Seal)

/s/ GEORGE K. C. YEH

I, Charles H. Pletcher, Vice Consul of the United States of America in Taipeh, Taiwan, China, do hereby certify that the above is the signature of the Minister of Foreign Affairs of the Government of China, duly authenticated by the seal of the Ministry, and that both were affixed to this document in my presence on this date.

GIVEN under my hand and seal this twenty-eighth day of March, 1951.

/s/ CHARLES H. PLETCHER

Charles H. Pletcher
Vice Consul of the United States of America
American Embassy,
Taipei, Taiwan

(Seal)

Service No. 1372

No fee prescribed

MINISTRY OF FINANCE

Republic of China
Taipeh, Taiwan
China

I, C. K. YEN, Finance Minister of the National Government of the Republic of China, do hereby certify that annexed hereto are full, true and correct copies of orders issued by the National Government of China to Bank of China, as shown by official records of the Ministry of Finance, together with correct translations in English to the same:

1. Confidential order No. 847 of February 27th, 1949;
2. Directive No. 95 of February 21st, 1949;
3. Confidential directive of August 20th, 1949;
4. Directive issued December 10th, 1949 by the Executive Yuan.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Taipeh this twenty-third day of March, 1951.

(Seal)

/s/ C. K. YEN

I, GEORGE K. C. YEH, Minister of Foreign Affairs of the National Government of the Republic of China, do hereby certify that the signature affixed above is the genuine signature of C. K. YEN who was at the time of signing and is now the Finance Minister of the Government of China.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this twenty-third day of March, 1951.

(Seal)

/s/ GEORGE K. C. YEH

I, Charles H. Pletcher, Vice Consul of the United States of America in Taipeh, Taiwan, China, do hereby certify that the above is the signature of the Minister of Foreign Affairs of the Government of China, duly authenticated by the seal of the Ministry, and that both were affixed to this document in my presence on this date.

GIVEN under my hand and seal this twenty-eighth day of March, 1951.

/s/ CHARLES H. PLETCHER

Charles H. Pletcher
Vice Consul of the United States of America
American Embassy,
Taipei, Taiwan

(Seal)

Service No. 1370

No fee prescribed

Appendix
BANK OF CHINA
Head Office
"B" TRANSLATION
THE MINISTRY OF FINANCE

CONFIDENTIAL ORDER NO. 847

Date: 27th day of 2nd month of the 38th year of the Republic of China (i.e. February 27th 1949)

To: The Bank of China—Head Office.

Whereas this Ministry on the 26th day of the 1st month of the 38th year (i.e. January 26th 1949) received from the Executive Yuan a confidential order stating that inasmuch as the National Government shall as from the 5th day of the 2nd month of the current year (i.e. February 5th 1949) conduct all official business in Canton, the Central Bank of China, the Bank of China, the Bank of Communications, the Farmers' Bank, the Central Trust of China, the Postal Remittance & Savings Bank, and the Central Cooperative Bank, shall all according to law be established in the same locality with the National Government; that this Ministry shall forthwith instruct each of the said institutions to conduct all official business without fail in Canton together with the National Government as from the said 5th day of the 2nd month; but that inasmuch as Shanghai is the financial centre of the whole country it shall be necessary to maintain its stability and that each of the said institutions shall be responsible for assisting the National Government in maintaining such stability and concurrently for evolving measures for such purpose; and that this Ministry shall instruct each of the said institutions to evolve such measures and to submit the same;

Therefore it is hereby confidentially ordered that each of the aforesaid institutions take note of the foregoing and report the date of removal to Canton and said measures in order to have the same submitted to the Executive Yuan.

Seal

HSU KAN

Minister of Finance

Appendix
BANK OF CHINA
Head Office
"D"

TRANSLATION
THE MINISTRY OF FINANCE

DIRECTIVE REF. CHARACTERS CHAI CHIEN HU
[CHINESE CHARACTERS] NO. 95

Dated the 21st day of the 2nd month of the 38th year of the Republic of China (i.e. February 21st 1949)

To the Bank of China-Head Office

INRC: Petition dated the 7th day of the 2nd month of the 38th year setting forth that in compliance with an order senior officers of the Bank have been duly despatched as representatives of the Head Office to establish and maintain an office in Canton and also other senior officers have been retained in Shanghai to deal with all relative matters therein.

(Text): Petition duly noted. It is hereby ordered that the Foreign Department of the petitioner Bank be forthwith removed to Hongkong in order to maintain all contacts. Besides submitting a report hereof to the higher authorities (the Ministry) orders compliance therewith.

(Signed) HSU KAN
Minister

Character Hu No. 257

BANK OF CHINA
Head Office
"B"

TRANSLATION
MINISTRY OF FINANCE

Confidential Directive

REFERENCE CHARACTERS CHAI CHIEN HUEI NO. 3071

Dated the 20th Day of the 8th Month of the 38th Year
(August 20, 1949)

TO:

THE BANK OF CHINA-HEAD OFFICE.

1. The above-cited bank which is required in accordance with the provisions of its Charter to be established in same locality as the National Capital shall expeditiously prepare for removal to Chungking together with the National Government, and all its personnel shall not cause any delay under any pretext.
2. The Foreign Exchange Department (of the said bank) concerned and all necessary personnel may remain in Hongkong but shall in the event of any difficulty arising be removed to Taiwan; and in either case contact shall be maintained with the Head Office by having some of its personnel stationed in Chungking.
3. Documents and books and important public property and deeds shall be removed to Hongkong first and, whenever necessary, be further removed to Taiwan, but copies of such documents and books shall be kept in the Head Office for use and reference.
4. Should the said bank have no branch in Taiwan, permission may be obtained for the establishment therein of a business office, but no transaction with the public shall be undertaken for the time being.

5. As circumstances may so require, branches and sub-branches of the said bank may from time to time be closed or removed to places of safety.
6. Any one of the personnel of the Head Office or of any branch or sub-branch of the said bank having private contact with the "bandits" or receiving therefrom any clandestine orders shall be severely dealt with upon verification.

BE IT ORDERED that the foregoing six points be complied with and that report thereof be submitted.

(Signed)
HSU KAN
Minister

BANK OF CHINA
Head Office
"B"

TRANSLATION

From : The Executive Yuan
To : The Bank of China-Head Office
Date : 10th day of 12th month of the 38th year of the Republic of China (i.e. December 10, 1949)

Order No. Tai (38) 0189

Text : It is hereby ordered that the Bank of China-Head Office be removed to Taipeh immediately.

(Signed)
YEN HSI-SHAN
Prime Minister

No. 12700

United States
Court of Appeals
for the Ninth Circuit.

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

WHITNEY & COMPANY, a Corporation, Its
Officers and JAMES R. O'BRIEN, His Repre-
sentatives, Agents and Employees,

Respondent.

Transcript of Record

Petition for Enforcement of Order of
The Federal Trade Commission
Court of the United States.

FILED

MAY 17 1951

PAUL F. O'BRIEN,
CL



No. 12700

**United States
Court of Appeals**
for the Ninth Circuit.

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

**WHITNEY & COMPANY, a Corporation, Its
Officers and JAMES R. O'BRIEN, His Repre-
sentatives, Agents and Employees,**

Respondent.

Transcript of Record

**Petition for Enforcement of Order of
The Federal Trade Commission
Court of the United States.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BOGLE, BOGLE & GATES,

Central Building,
Seattle, Washington,
For the Respondent.

JAMES W. CASSEDY,

Washington, D. C.,
For the Petitioner.

United States of America Before Federal Trade
Commission

Docket No. 5279

In the matter of

CARL RUBENSTEIN, individually and acting as agent for and in behalf of his son, Samuel Rubenstein, CARL RUBENSTEIN (partnership), WHITNEY & COMPANY, a corporation, PUGET SOUND & ALASKA TRADING COMPANY, INC., a corporation, and JAMES R. O'BRIEN.

COMPLAINT

The Federal Trade Commission having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, have violated and are violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph One: Respondent Carl Rubenstein, an individual residing in the City of Seattle, State of Washington, is a partner with his son, Samuel Rubenstein, in a firm which operates under the trade name of "Carl Rubenstein." The individual respondent Carl Rubenstein and the firm of "Carl Rubenstein" have their principal offices and place of

business at 3001 Smith Tower Building, Seattle, Washington.

Respondent Carl Rubenstein is a partnership composed of the individual respondent Carl Rubenstein and his son, Samuel Rubenstein. The partnership does business under the registered trade name of "Carl Rubenstein" (although this partnership is sometimes and for some purposes known as Rubenstein & Rubenstein).

Respondent Whitney & Company is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 3001 Smith Tower Building, Seattle, Washington.

Samuel Rubenstein, the son of the individual respondent Carl Rubenstein, is an official of the hereinafter named respondents Whitney & Company and Puget Sound & Alaska Trading Company, Inc., and is a large stockholder in each of said companies. Samuel Rubenstein is in the United States Army and, prior to his departure for the Army several years ago, executed and delivered to his father, Carl Rubenstein, a general power of attorney whereby the respondent Carl Rubenstein as an individual was empowered to act for and did act in behalf of said Samuel Rubenstein in connection with the business conducted as "Carl Rubenstein," partnership, Whitney & Company and Puget Sound & Alaska Trading Company, Inc.

The officials of the respondent Whitney & Company on July 7, 1941, organized Puget Sound & Alaska Trading Company, Inc., for the specific pur-

pose of conducting certain of the business of Whitney & Company which the officers of Whitney & Company did not believe should be conducted under Whitney & Company's name. This business can best be described as the sale of sea food products directly to large buyers at net prices which reflected brokerage.

Respondent Puget Sound & Alaska Trading Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal office and place of business located at 3001 Smith Tower Building, Seattle, Washington. Respondent Puget Sound & Alaska Trading Company, Inc., is owned by and is a subsidiary of Whitney & Company.

Respondent James R. O'Brien is an individual residing in the City of Seattle, State of Washington, and has his office and principal place of business located at 3001 Smith Tower Building, Seattle, Washington. Said respondent James R. O'Brien is also an official and a large stockholder in Whitney & Company and Puget Sound & Alaska Trading Company, Inc.

Paragraph Two: Respondents Carl Rubenstein, individually, and Carl Rubenstein (the partnership), together with James R. O'Brien, individually and as an official of Whitney & Company and Puget Sound & Alaska Trading Company, Inc., together with Whitney & Company, a corporation, and Puget Sound & Alaska Trading Company, Inc., a corporation, all occupy jointly and severally a suite of

offices located at 3001 Smith Tower Building, Seattle, Washington, which offices are the principal offices and place of business of each of the respective respondents.

Paragraph Three: Each of the respondents since June 19, 1936, has been and is now engaged in the business of buying, selling and distributing canned salmon, canned tuna, canned mackerel and other canned sea food products (all of which are hereinafter designated as sea food products) for their own account for resale.

The respondents since June 19, 1936, in the course and conduct of their said businesses, have sold and distributed a substantial portion of their sea food products directly and through brokers, to buyers located in states other than the state in which the respondents are located and as a result of said sales and the respondents' instructions, such sea food products are shipped and transported across state lines to such buyers so located.

Paragraph Four: All sea food products sold by respondents bear a label upon which appears a brand, trade-mark, or trade name. Such labels are attached to such sea food products to identify and distinguish them as the products of the persons owning the brands from the products of competitors.

A brand, trade-mark, or trade name may be defined as a symbol of business good will. Good will is an attitude in people which causes them to continue to patronize a certain place or person or to purchase a definite commodity. Upon the brand used depends to whom the good will created by the product ac-

crues. Thus, when respondents sell goods which bear their own brand, the good will accrues to them; whereas, when they sell goods bearing the brand of another, the good will accrues not to the respondents but to the person who owns the brand. That such is the purpose and effect of the use of brands is well known in the industry.

The respondents' sea food products are sold and distributed under two distinct brand classifications, namely, (1) sellers' brands and (2) distributors' brands.

A seller's brand may be defined as a brand, owned and controlled by the original seller, and as referred to herein designated brands owned and utilized by respondents in the promotion and sale of its products, which brand identifies the particular products for which respondents assume the responsibility all the way through the channels of distribution to the consumer, and whatever good will is established thereby accrues to respondents. Respondents determine the sales and price policies with reference to such sea food products. Among the brands so used by respondents are:

Bestred, Farbest, Blue Bird, Best Yet, Red Rambler, Sprite, Whitney's Best, Whitworth, Golden Shore, Sea Run, Northern Gem, North View.

Distributors' brands may be defined as brands owned and controlled by other than the original sellers and as referred to herein designate brands utilized by distributors other than the respondents which identify the sea food products with the particular distributor and permit such distributors to

promote the sale of those sea food products independently of respondents; and distributors rather than respondents assume the responsibility all the way through the channels of distribution to the consumer and not whatever good will is established accrues to the distributors and not to the respondents. Distributors and not respondents determine the sales and price policies with reference to such sea food products.

Paragraph Five: Respondents sell and distribute sea food products by two separate and distinct methods.

First: The first method is by selling to buyers through brokers of sea food products.

A broker of sea food products may be defined as a sales agent who negotiates the sale of sea food products for and on account of the seller as principal and whose compensation is a commission or brokerage fee paid by the seller. A broker of sea food products does not buy sea food products from his principal and sell such products for his own account.

Such brokers act as respondents' sales agents, soliciting and obtaining orders for respondents' sea food products at respondents' prices and on respondents' terms. Such brokers transmit such purchase orders to respondents who thereafter invoice and ship the sea food products to the customers. The respondents pay such brokers for their service in negotiating and making such sales for respondents' account, commissions or brokerage fees, which are customarily based on a percentage of the invoice sales prices of the sea food product sold.

The sea food products so sold by brokers always

bear the brand or label of the respondents or of the buyers to whom respondents sell. Therefore, none of the good will established by the products accrues to the brokers. Such brokers are not traders for profit and do not take title to or have any financial interest in the product sold, and neither make a profit nor suffer a loss on the transaction.

Second: The second method is by the sale of sea food products by the respondents direct to buyers. All such buyers referred to herein are "direct buyers." In transactions between respondents and such buyers, respondents do not use brokers.

There are in fact two separate and distinct classifications of direct buyers. One class is known as "buying brokers" (who designate themselves as brokers but who are not in fact brokers). The other class of direct buyers consists, among others, of chain stores, large wholesalers and members of buying groups.

The sea food products sold by respondents to such direct buyers principally bear brands or labels owned by such buyers, and as to such sea food products, all the good will established by the products accrues to such direct buyers.

Respondents also sell to other direct buyers (some of whom also incorrectly designate themselves as "brokers") who purchase respondents' sea food products exclusively under respondents' brands or labels in their own respective names and for their own accounts for resale.

Respondents pay such buyers of their sea food products, directly or indirectly (regardless of

whether such sea food products are purchased under respondents' labels or distributors' labels), commissions or brokerage fees, or allowances or discounts in lieu thereof on such purchases.

Such direct buyers transmit their own purchase orders for sea food products directly to the respondents. The respondents thereafter invoice and ship such sea food products directly to such buyers from whom respondents collect the purchase price of the merchandise. The respondents, among their several methods of sales, pay such buyers commissions or brokerage fees on such purchases by deducting or allowing from the invoice price of the sea food products purchased an amount which is equal or approximately equal to the commissions or brokerage fees paid by the respondents to their brokers (as illustrated in method one), or by selling to such buyers at a net price which reflects brokerage.

Contrary to the manner in which brokers operate (as described in method one above) such buyers are traders for profit purchasing and reselling such sea food products in their own names and for their own accounts, taking title to the sea food products and assuming all risk incident to ownership.

Such resales are not made at the prices, and on the terms dictated by respondents, but at the prices and on the terms determined by the buyer who makes a profit or suffers a loss thereon, as the case may be.

Said direct buyers shop the market, and purchase sea food products from several sellers, including respondents, and purchase where they are able to secure the most favorable prices and terms, includ-

ing the payment of commissions and brokerage fees.

Said buyers pay the price of the sea food products purchased from respondents, as a condition precedent to delivery of such sea food products by the carrier to them. If the sea food products shipped by respondents to the buyers are lost or damaged in transit, such buyers file claim with the carrier and collect damages from the carrier or for their own accounts.

Such buyers, upon receipt of such sea food products from respondents, warehouse them in their own warehouses or in public warehouses and insure the products at their own expense and in their own names and for their own accounts against contingent loss or damage. Subsequently, said buyers pledge warehouse receipts and insurance contracts covering these products they have purchased as security for loans from banks.

Paragraph Six: The respondents, since June 19, 1936, in connection with the interstate sale of their sea food products by the second method set forth in Paragraph Five, have paid or granted and are now paying or granting, directly and indirectly, commissions, brokerage, or other compensation, or discounts **in lieu** thereof, to buyers of their food products, and such acts and practices as set forth above are in violation of subsection (c) of Section 2 of the Clayton Act as amended.

Wherefore, the Premises Considered, the Federal Trade Commission on this 12th day of February, A. D., 1945, issues its complaint against said respondents.

NOTICE

Notice is hereby given you, Carl Rubenstein, individually and acting as agent for and in behalf of his son, Samuel Rubenstein, Carl Rubenstein (partnership), Whitney & Company, a corporation, Puget Sound & Alaska Trading Company, Inc., a corporation, and James R. O'Brien, respondents herein, that the 23rd day of March, A. D., 1945, at 2 o'clock in the afternoon, is hereby fixed as the time and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Re-

spondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 12th day of February, A. D., 1945.

By the Commission.

[Seal] /s/ OTIS B. JOHNSON,
Secretary.

United States of America Before Federal Trade
Commission

Docket No. 5279

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 20th day of March, A. D., 1945

Commissioners: Ewin L. Davis, Chairman
Garland S. Ferguson
Charles H. March
William A. Ayres
Robert E. Freer

[Title of Cause.]

ORDER APPOINTING TRIAL EXAMINER
AND FIXING TIME AND PLACE FOR
TAKING TESTIMONY

This matter being at issue and ready for the taking of testimony, and pursuant to authority vested in the Federal Trade Commission,

It Is Ordered that John L. Hornor, a Trial Examiner of this Commission, be and he hereby is desig-

nated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law;

It Is Further Ordered that the taking of testimony in this proceeding begin on Thursday, April 26, 1945, at ten o'clock in the forenoon of that day (Pacific Standard Time), in Room 117, Federal Office Building, Seattle, Washington.

Upon completion of testimony for the Federal Trade Commission, the Trial Examiner is directed to proceed immediately to take testimony and evidence on behalf of the respondent. The Trial Examiner will then close the case and Make his Report upon the Facts; Conclusions of Facts; Conclusions of Law; and Recommendation for Appropriate Action by the Commission.

By the Commission:

/s/ OTIS B. JOHNSON,
Secretary.

United States of America Before Federal Trade
Commission

Docket No. 5279

[Title of Cause.]

ANSWER

Comes Now the respondents, Carl Rubenstein, individually and acting as agent for and in behalf of his son, Samuel Rubenstein, Carl Rubenstein (partnership), Whitney & Company, a corporation, Puget Sound & Alaska Trading Company, Inc., a corpo-

ration, and James R. O'Brien, and answering the complaint herein in the above-entitled proceeding, each of whom states that for the purpose of this proceeding only, and in order to dispose of the matter set forth in the complaint without trouble and expense incident to a contest of the issues, admit each and every material allegation of fact set forth in said complaint.

Each of the respondents for a further answer, however, state that they have discontinued the practices complained of and that they are no longer directly or indirectly granting and allowing commissions or brokerage fees to buyers on interstate purchases made by such buyers in their own behalf. Each of the respondents further aver that they have no intention of resuming said practices.

Each of the respondents hereby specifically waive all intervening procedure, including hearings as to the facts, Trial Examiner's Report, and the filing of briefs and oral argument.

CARL RUBENSTEIN,
individually and acting as agent for and on behalf
of his son Samuel Rubenstein

By /s/ CARL RUBENSTEIN,

CARL RUBENSTEIN
(partnership)

By /s/ CARL RUBENSTEIN,

WHITNEY & COMPANY,
a corporation,

By /s/ JAMES R. O'BRIEN,

PUGET SOUND & ALASKA
TRADING COMPANY, INC.,

By /s/ SAM RUBENSTEIN,

JAMES R. O'BRIEN,

By /s/ JAMES R. O'BRIEN.

Dated this 11 day of Dec., 1945.

Filed Jan. 8, 1946.

United States of America Before Federal Trade
Commission
Docket No. 5279

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 9th day of January, A. D., 1946.

Commissioners: William A. Ayres, Chairman,
Garland S. Ferguson,
Ewin L. Davis,
Robert E. Freer,
Lowell B. Mason.

[Title of Cause.]

ORDER GRANTING RESPONDENTS'
REQUEST FOR PERMISSION TO WITH-
DRAW ANSWER AND TO FILE SUBSTI-
TUTE ANSWER

This matter coming on to be heard by the Com-

mission upon the request of respondents for permission to withdraw their answers herein received on February 26, 1945, and thereafter filed, and to substitute in lieu thereof the supplemental answer dated December 11, 1945, and annexed to said request, and the Commission having duly considered the said request and the record herein, and being now fully advised in the premises:

It Is Ordered that respondents' request that they be permitted to withdraw their answers received on February 26, 1945, and thereafter filed herein, and to file in lieu thereof their answer dated December 11, 1945, and annexed to said request be, and the same hereby is, granted.

By the Commission.

[Seal] /s/ OTIS B. JOHNSON,
Secretary.

United States of America Before Federal Trade
Commission

Docket No. 5279

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 25th day of March, A. D., 1946.

Commissioners: William A. Ayres, Chairman,
Garland S. Ferguson,
Ewin L. Davis,
Robert E. Freer,
Lowell B. Mason.

[Title of Cause.]

FINDINGS AS TO THE FACTS AND
CONCLUSION

Pursuant to the provisions of an Act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by the aforesaid Act, the Federal Trade Commission on February 12, 1945, issued and subsequently served its complaint in this proceeding upon the respondents, Carl Rubenstein, individually and acting as agent for and in behalf of his son, Samuel Rubenstein, Carl Rubenstein (partnership), Whitney & Company, a corporation, Puget

Sound & Alaska Trading Company, Inc., a corporation, and James R. O'Brien, charging them with the violation of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. After the issuance of said complaint and the filing of respondents' answer thereto, the respondents withdrew said answer and filed in lieu thereof an answer admitting all the material allegations of fact set forth in said complaint and waiving intervening procedure and further hearing as to said facts. Thereafter, this proceeding regularly came on for final hearing before the Commission upon said complaint and substitute answer filed by the respondents; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

Findings as to the Facts

Paragraph One: Respondent Carl Rubenstein, an individual residing in the City of Seattle, State of Washington, is a partner with his son, Samuel Rubenstein, in a firm which operates under the trade name of "Carl Rubenstein." The individual respondent Carl Rubenstein and the firm of "Carl Rubenstein" have their principal offices and place of business at 3001 Smith Tower Building, Seattle, Washington.

Respondent Carl Rubenstein is a partnership composed of the individual respondent Carl Ruben-

stein and his son, Samuel Rubenstein. he partnership does business under the registered trade name of "Carl Rubenstein" (although this partnership is sometimes and for some purposes known as "Rubenstein & Rubenstein").

Respondent Whitney & Company is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 3001 Smith Tower Building, Seattle, Washington.

Samuel Rubenstein, the son of the individual respondent Carl Rubenstein, is an official of the hereinafter named respondents Whitney & Company and Puget Sound & Alaska Trading Company, Inc., and is a large stockholder in each of said companies. Samuel Rubenstein is in the United States Army and, prior to his departure for the Army several years ago, executed and delivered to his father, Carl Rubenstein, a general power of attorney whereby the respondent Carl Rubenstein as an individual was empowered to act for, and did act in behalf of, said Samuel Rubenstein in connection with the business conducted as "Carl Rubenstein," partnership, Whitney & Company, and Puget Sound & Alaska Trading Company, Inc.

The officials of the respondent Whitney & Company on July 7, 1941, organized Puget Sound & Alaska Trading Company, Inc., for the specific purpose of conducting certain of the business of Whitney & Company which the officers of Whitney & Company did not believe should be conducted under Whitney & Company's name. This business can best

be described as the sale of sea-food products direct to large buyers at net prices which reflected brokerage.

Respondent Puget Sound & Alaska Trading Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 3001 Smith Tower Building, Seattle, Washington. Respondent Puget Sound & Alaska Trading Company, Inc., is owned by, and is a subsidiary of, Whitney & Company.

Respondent James R. O'Brien is an individual residing in the City of Seattle, State of Washington, and has his office and principal place of business located at 3001 Smith Tower Building, Seattle, Washington. Said respondent James R. O'Brien is also an official of, and a large stockholder in, Whitney & Company and Puget Sound & Alaska Trading Company, Inc.

Paragraph Two: Respondents, Carl Rubenstein, individually and as a copartner with Samuel Rubenstein trading as "Carl Rubenstein," together with James R. O'Brien, individually and as an officer of Whitney & Company and of Puget Sound & Alaska Trading Company, Inc., a corporation, together with Whitney & Company, a corporation, and Puget Sound & Alaska Trading Company, Inc., a corporation, all occupy jointly and severally a suite of offices located at 3001 Smith Tower Building, Seattle, Washington, which offices are the principal offices and place of business of each of the respective respondents.

Paragraph Three: Each of the respondents, since June 19, 1936, has been engaged in the business of packing, and in the sale and distribution of, canned salmon, canned tuna, canned mackerel, and other canned sea-food products, all of which are hereinafter referred to as "food products."

Paragraph Four: Respondents cause said food products, when sold by them, to be transported from their aforesaid place of business in the State of Washington to purchasers thereof located in various other states of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said food products in commerce among and between the various states of the United States.

Paragraph Five: Respondents sell said food products through legitimate intermediaries who act as their agents and to whom are paid commissions and brokerage fees for the services so rendered. In addition, the respondents also sell their food products to direct buyers, who may be either so-called "buying brokers" or chain stores, large wholesalers, and members of buying groups. In so selling their food products the respondents use their own brand names, such as "Bestred," "Farbest," "Blue Bird," "Best Yet," "Red Rambler," "Sprite," "Whitney's Best," "Whitworth," "Golden Shore," "Sea Run," "Northern Gem," and "North View." In addition, respondents also sell such food products under brands of their buyers, which brand names are different from those of the respondents' brands and

which identify the food products with the particular buyer or distributor.

Paragraph Six: The respondents, since June 19, 1936, in connection with the sale of their food products in interstate commerce, have sold their food products under their own brands or under the brands of their buyers to direct buyers who purchase respondents' food products in their own names and for their own accounts for resale. During the time mentioned herein respondents have paid or granted to such direct buyers, directly or indirectly, commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof, on such purchases made in their own names and for their own accounts for resale.

Such direct buyers transmit their own purchase orders for food products direct to respondents, who invoice and ship such food products direct to such buyers and collect the purchase price from them. The respondents, among their several methods of sales, pay such buyers commissions or brokerage fees on such purchases by deducting or allowing from the invoice price of the food products purchased, an amount which is equal or approximately equal to the commissions or brokerage fees paid by respondents to their brokers or by selling such buyers at a net price which reflects brokerage.

Contrary to the manner in which brokers operate, such buyers are traders for profit, purchasing and reselling such food products in their own names and for their own accounts, taking title to the food prod-

ucts and assuming all the risk incident to ownership. The resale of such merchandise is not made at prices and on terms dictated by respondents but at the prices and on the terms determined by the buyer, who makes a profit or suffers a loss thereon, as the case may be. Such direct buyers shop the market and purchase food products from several sellers, including respondents, and purchase where they are able to secure the most favorable prices and terms, including the payment of commissions and brokerage fees. If the food products shipped by the respondents to the buyers are lost or damaged in transit, such buyers file claim with the carrier and collect damage from such carrier for their own accounts. Such buyers, upon receipt of such food products from respondents, warehouse them in their own warehouses or in public warehouses and insure the products at their own expense and in their own names and for their own accounts against contingent loss or damage and pledge warehouse receipts and insurance contracts covering these products they have purchased as security for loans from banks.

Conclusion

The paying and granting by the respondents, directly or indirectly, of commissions, brokerage, or other compensation, and allowances or discounts in lieu thereof, to buyers of their food products who purchase such food products in their own names and for their own accounts for resale, as hereinabove

found, are in violation of subsection (c) of Section 2 of the Clayton Act as amended.

By the Commission.

[Seal] /s/ W. A. AYRES,
 Chairman.

Dated this 25th day of March, A. D. 1946.

Attest:

/s/ OTIS B. JOHNSON,
 Secretary.

United States of America Before Federal Trade
Commission

Docket No. 5279

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 25th day of March, A. D. 1946.

Commissioners: William A. Ayres, Chairman,
 Garland S. Ferguson,
 Ewin L. Davis,
 Robert E. Freer,
 Lowell B. Mason.

In the Matter of
CARL RUBENSTEIN, individually and acting as
agent for and in behalf of his son, Samuel Rubenstein, CARL RUBENSTEIN (partnership), WHITNEY & COMPANY, a corpora-

tion, PUGET SOUND & ALASKA TRADING COMPANY, INC., a corporation, and JAMES R. O'BRIEN.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and substitute answer of the respondents, which substitute answer admits all the material allegations of fact set forth in said complaint and waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of subsection (c) of Section 2 of the Act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act):

It Is Ordered that the respondents, Whitney & Company, a corporation, and Puget Sound & Alaska Trading Company, Inc., a corporation, and their respective officers, and Carl Rubenstein, individually and as a copartner trading as Carl Rubentsein, and James R. O'Brien, and their respective representatives, agents, and employees, directly or through any corporate or other device in connection with the sale and distribution of canned salmon, canned tuna, canned mackerel, and other canned sea-food products in commerce as "commerce" is defined in the

aforesaid Clayton Act, do forthwith cease and desist from:

Paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, upon purchases made for such buyer's own account.

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

[Seal] /s/ OTIS B. JOHNSON,
Secretary.

CERTIFICATE

I, Wm. P. Glendening, Jr., Acting Secretary of the Federal Trade Commission, and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter.

That this transcript is certified to the United States Court of Appeals for the Ninth Circuit, pursuant to the filing in said Court of an application for enforcement of an Order to Cease and Desist dated March 25, 1946, entered by the Federal Trade Commission in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 21st day of September, A. D. 1950.

[Seal] /s/ WM. P. GLENDENING, JR.,
Acting Secretary.

[Endorsed] No. 12700. United States Court of Appeals for the Ninth Circuit. Federal Trade Commission, Petitioner, vs. Whitney & Company, a corporation, its officers and James R. O'Brien, his representatives, agents and employees, Respondents. Transcript of the Record. Petition for Enforcement of Order of the Federal Trade Commission Court of the United States.

Filed: September 29, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12700

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

WHITNEY & COMPANY, a corporation, its officers,
and JAMES R. O'BRIEN, his representatives,
agents and employees,

Respondents.

APPLICATION FOR ENFORCEMENT OF
ORDER TO CEASE AND DESIST

To the Honorable United States Court of Appeals
for the Ninth Circuit:

Comes Now the Federal Trade Commission, an administrative Commission established by, and existing under and by virtue of, an Act of Congress entitled: "An Act to Create a Federal Trade Commission, etc.," approved September 26, 1914, as amended March 21, 1938 (38 Stat. 717; 15 U. S. C. 41; 52 Stat. 111.), hereinafter referred to as the "Commission," and pursuant to the provisions of Section 11 of the Clayton Act (15 U. S. C. 21), respectfully applies for a decree enforcing a certain order to cease and desist issued by the "Commission" against respondents Whitney & Company, a corporation, and its officers, and James R. O'Brien, and his representatives, agents, and employees, on the 25th day of March, 1946 (11 F. R. 4969; 42 F. T. C. Dec. 138, 147) in a certain proceeding in-

stituted by and before the "Commission" styled "In the Matter of Carl Rubenstein* individually and acting as agent for and in behalf of his son, Samuel Rubenstein, Carl Rubenstein (partnership)*, Whitney & Company, a corporation, Puget Sound & Alaska Trading Company, Inc.,* a corporation, and James R. O'Brien" (F. T. C. Docket No. 5279, 42 F. T. C. Dec. 138.).

In support of its application, the "Commission" respectfully showeth unto the Court the following facts:

1. Respondent Whitney & Company (hereinafter referred to as "Whitney") is a corporation under and by virtue of the laws of the State of Washington; its officers are James R. O'Brien, President, Charlotte E. Jung, Vice-President, and Sam Rubenstein, Secretary and Treasurer. Respondent James R. O'Brien is an individual and an official of corporate respondent "Whitney." Respondents are engaged in business within the territorial jurisdiction of this Court and have their principal office

*The cease and desist order also runs against Carl Rubenstein, individually and as a copartner trading as Carl Rubenstein, and also against Puget Sound & Alaska Trading Company, Inc., a corporation, and its officers. However, they are not made respondents in this proceeding since Puget Sound & Alaska Trading Company, Inc., was dissolved on December 31, 1946, and Carl Rubenstein died March 19, 1947.

and place of business at 860 Central Building, Seattle, Washington.**

Since June 1936 respondents have been and are now engaged in the business of selling canned sea food products. In the course and conduct of their business, respondents have caused their said products to be shipped and transported from their place of business in the State of Washington to purchasers thereof located in various other states of the United States.

2. On the 12th day of February, 1945, the "Commission" issued its complaint against respondents, fully describing their method of doing business and charging them with having violated Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (49 Stat. 1526, 1527; 15 U. S. C. 13 (c)) by paying or granting, directly or indirectly, commissions, brokerage, or other compensation, or discounts in lieu thereof, to buyers of their canned sea food products purchasing in their own name and for their own account for resale, as is more fully shown by the complaint certified up with the filing of this application and prayed to be read and considered as a part hereof. The "Commission's" complaint was served on respondents on the 14th day of February, 1945.

3. Thereafter, on the 26th day of February,

**On March 25, 1946, the date the cease and desist order was issued, respondents' principal office and place of business was 3001 Smith Tower Building, Seattle, Washington.

1945, respondents filed their original answer to the complaint but later moved the "Commission" for permission to withdraw their original answer and substitute in lieu thereof a supplemental answer dated the 11th day of December, 1945. The "Commission" granted respondents' request and on the 8th day of January, 1946, respondents withdrew their original answer and filed a substitute answer dated the 11th day of December, 1945, in which they admitted "each and every allegation of fact set forth in" the complaint; waived "all intervening procedure, including hearings as to the facts, Trial Examiner's Report and the filing of briefs and oral argument"; averring, however, that they had discontinued the unlawful practices complained of and stated that they had no intention of resuming such practices.

4. Thereupon, on the 25th day of March, 1946, the "commission" made its report in writing in said proceeding, setting forth therein its findings as to the facts and its conclusion that respondents had violated Section 2(c) of the Clayton Act, as amended, and issued the cease and desist order aforesaid, directing Whitney & Company and its officers, and James R. O'Brien and his representatives, agents, and employees "in connection with the sale and distribution of" canned sea food products, "in commerce as 'commerce' is defined in the aforesaid Clayton Act" to cease and desist from:

Paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation, allowance

or discount in lieu thereof, upon purchases made for such buyer's own account.

5. The "Commission's" order to cease and desist, issued as aforesaid on the 25th day of March, 1946, was duly served on respondents on the 1st day of April, 1946; and since the date of its issuance has been, and is now, in full force and effect.

6. Respondents have failed, neglected, and refused to obey the "Commission's" said order to cease and desist in that since the 25th day of March, 1946, they have continued to pay, grant or allow commissions or brokerage, or other compensation or allowance or discount in lieu thereof, to buyers who purchase in their own name and for their own account respondents' canned sea food products for resale.

The following are typical and representative of sales made in interstate commerce in which respondents have violated the cease and desist order issued as aforesaid:

(a) On or about the 16th day of November, 1946, Christian Brokerage Company, Atlanta, Georgia (hereinafter referred to as "Christian"), in its own name and for its own account, purchased from "Whitney" 2,000 cartons of canned salmon for resale. "Whitney" caused this salmon to be shipped freight collect in car No. NRC 17173 from Aberdeen, Washington, to Atlanta, Georgia, consigned as follows:

"Order of Whitney & Co. Notify Christian Bkge Co."

and invoiced this salmon as follows:

“Nov. 16, 1946. Sold to Christian Brokerage Co., 185 Spring St. SW. Atlanta, Ga. Terms 1½% Ten Days (\$330.00) F O B Coast 2,000 etn. 48/½ #F. ‘Golden Shore’ Chum Salmon @ 11.00 \$22,000.00”

On the 30th day of November, 1946, the Southern Railway Company, Atlanta, Georgia, billed “Christian” for the freight charges on this carload of salmon which “Christian” paid on the 6th day of December, 1946, with check No. 3931. “Christian” resold this salmon to nine of its customers. On or about the 2nd day of December, 1946, “Whitney,” acting in its corporate capacity, and under and by direction of its officers, paid “Christian” \$541.75, representing 2½% brokerage on \$21,670.00 net purchase price of this shipment of salmon to “Christian,” all of which is more fully shown by photostatic copies of the duplicate invoice and the freight bill attached hereto as Exhibits A and B, respectively, and prayed to be read as a part hereof.

(b) On or about the 14th day of July, 1947, “Christian,” Atlanta, Georgia, in its own name and for its own account purchased from “Whitney,” Seattle, Washington, 1109 cartons of canned salmon for resale. “Whitney” caused this salmon to be transported from Seattle, Washington, to Atlanta, Georgia, on the 25th day of July, 1947, freight collect, in car No. NP 27571; drawing a sight draft on “Christian” for \$18,298.50, the purchase price thereof, and billed this salmon as follows:

“July 24, 1947; Sold To Whitney & Co., c/o Christian Brokerage Co., 187 Spring St. SW., Atlanta, Ga., Terms 1½% Ten Days F O B Coast 1109 ctn. 48/1# Tall Golden Shore Chum Salmon @ 16.50 18,298.50”

On the face of the invoice the following phrase was typed:

“This Is Memo Billing . . .”

and the following notation appeared in handwriting:

“Am sure you understand necessity for this procedure” signed “SR.”

The sight draft drawn on “Christian” was signed “Whitney & Company by Sam Rubenstein.” “Christian” paid the sight draft, less 1½% discount, by check No. 4959 dated the 4th day of August, 1947, and on the 11th day of August, 1947, paid the freight charges on this car of salmon to the Southern Railway Company, Atlanta, Georgia, by check No. 4990. “Christian” resold this salmon to 21 of its customers. On or about the 11th day of August, 1947, “Whitney,” acting in its own corporate capacity and under and by direction of its officers, paid “Christian” \$450.60, representing 2½% brokerage on \$18,024.02, net purchase price of this salmon to “Christian,” all of which is more fully shown by photostatic copies of: Memorandum Purchase Order dated July 14, 1947, marked Exhibit C; Confirmation Telegram dated July 16, 1947, signed by “Christian” marked Exhibit D; acknowledgment telegram

dated July 17, 1947, signed by "Whitney" marked Exhibit E; telegram dated July 23, 1947, advising shipment of order, signed by "Whitney" marked Exhibit F; letter addressed to "Christian" dated July 24, 1947, signed "Whitney & Company by Sam Rubenstein" marked Exhibit G; memo billing dated July 24, 1947, marked Exhibit H; paid sight draft dated July 24, 1947, drawn on "Christian" and signed "Whitney & Company by Sam Rubenstein" marked Exhibit I; cancelled check No. 4959 dated August 4, 1947, drawn by "Christian" in payment of sight draft, marked Exhibit J; confirmation memorandum dated August 6, 1947, marked Exhibit K; paid freight bill, marked Exhibit L; cancelled check No. 4990 dated August 11, 1947, in payment of freight bill, marked Exhibit M; memorandum of "damaged" or "bad order" goods, dated August 6, 1947, marked Exhibit N; brokerage notation dated 8/11/47 attached to duplicate copy of "Memo Billing" marked Exhibit O; entry in "Christian Cash Receipt Book" dated 8/11/47 showing brokerage of \$450.60 received from "Whitney," marked Exhibit P, all of which are attached hereto and prayed to be read as a part hereof.

Now, Therefore, in consideration of the premises and being without remedy save in a United States Court of Appeals, where, by virtue of the provisions of Section 11 of the Clayton Act (15 U.S.C. 21), matters of this nature are exclusively and properly cognizable, the "Commission" respectfully applies to this Honorable Court for a decree enforcing the aforesaid order to cease and desist issued, as afore-

said, on the 25th day of March, 1946, against Whitney & Company and its officers, and James R. O'Brien and his representatives, agents, and employees.

As required by Section 11 of the Clayton Act (15 U.S.C. 21) the "Commission" has caused a transcript of the entire record in its proceedings against respondents, as aforesaid, to be certified by its secretary and filed with the Court concurrently with the filing of this application.

Wherefore, the Federal Trade Commission prays the Court to cause its Clerk to forthwith issue a rule directed to Whitney & Company, a corporation, James R. O'Brien, its president, Charlotte E. Jung, its vice-president, and Sam Rubenstein, its secretary and treasurer, and James R. O'Brien, an individual, his representatives, agents and employees (whose names are not known) to show cause why this petition of the "Commission" for enforcement of its said order to cease and desist, issued on the 25th day of March, 1946, as aforesaid, should not be granted and cause such rule to be served upon said respondents by the appropriate United States Marshal; and the "Commission" further prays the Court to make and enter herein its decree enforcing the "Commission's" aforesaid order to cease and desist, issued as aforesaid, commanding respondents Whitney & Company, a corporation, and its officers, as aforesaid, and respondent James R. O'Brien, an

individual, his representatives, agents and employees, to obey the same and comply therewith.

Respectfully submitted,

FEDERAL TRADE COMMISSION,

By /s/ JAMES W. CASSEDY,

Associate General Counsel.

Dated at Washington, D. C., on this 22nd day of September, A. D., 1950.

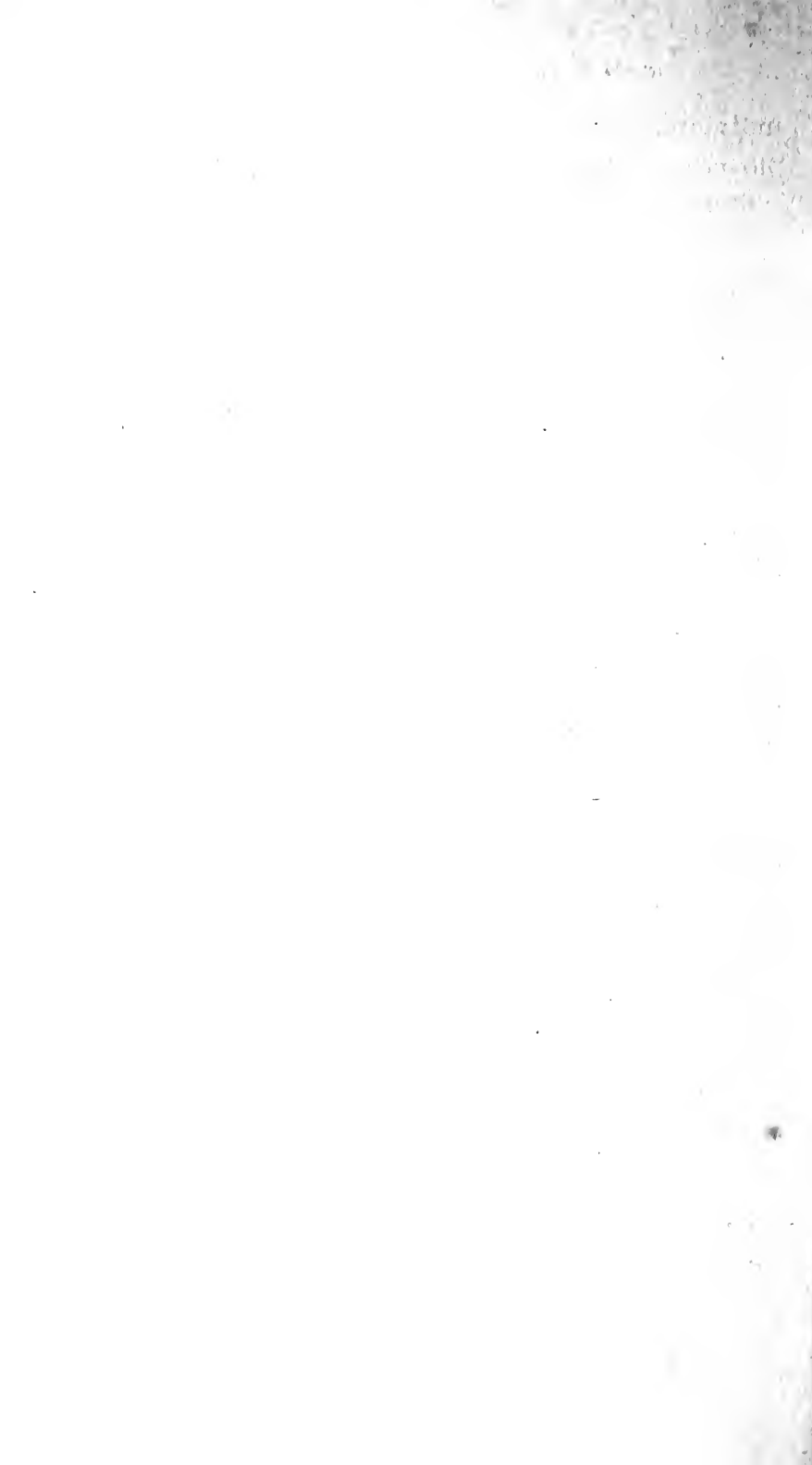
City of Washington,
District of Columbia—ss.

Personally appeared before me, the undersigned authority in and for the District of Columbia, James W. Cassedy, personally known to me and known by me to be an Associate General Counsel of the Federal Trade Commission, who, being by me first sworn, did on his oath state that he is informed and verily believes that the matters and facts stated in the above and foregoing application are true and correct as therein stated.

Witness my signature and official seal this the 22nd day of September, 1950.

[Seal] /s/ OLIVER E. McADAMS,
Notary Public for the
District of Columbia.

My Commission expires the 14th day of August, 1954.



41
DUPLICATE

WHITNEY & COMPANY

RED SALMON SALES AGENTS CANNED TUNA
Central Dist. HONOLULU
SEATTLE

FEATURED
BRANDS:

WHITNEY'S RED
BEST RED
RED RAMBLER
WHITWORTH
SPRITE
GOLDEN SMOKE

TO Cristiana, P.O. Box 10.
1541 L. St.
Alhambra, Ca.

DATE Nov. 16, 1946
ROUTED NP MESTL HAS SOU

FOR DISTRIBUTION TO

CAR NO. OR S. S. NRC 17173

TERMS 1 1/2 TEN DAYS FOB COA
(\$330.00)

INVOICED FOR ACCT. OF

CITY	SIZE	BRAND AND GRADE	DOZEN	PRICE
Alhambra, Ca.	4 / 1/2	Chum Salmon	11.00	\$22.00

*Book entry
2/1/47
Camm*

ER
MARINE INSURANCE WHEN EFFECTED BY SHIPPER
COVERED UNDER OPEN POLICY WITH
YANGTZE INSURANCE ASSOCIATION LTD.

DELIVERY
ORDER NO 346

CONTRACT
NO

INVOICE
NO 539

4
32
E-1411 A



INSTRUCTIONS ON BACK 11-45 Form 1649-T

FREIGHT BILL

SOUTHERN RAILWAY COMPANY, Dr.,
Charge on Articles transported:

ATLANTA GA.,

ORDER OF WHITNEY AND CO
NOTIFY CHRISTIAN BKGE CO

DATE

11/30/46

FREIGHT BILL NO

A 4458

Point of Origin to Destination

MPLS MSTL ALBIA WAB ESTL SOU DAN CNOTP CHATT SOU PETERS ST

Shipped From

Waybill Date and Number

Full Name of Shipper

Car Initials and Number

From Aberdeen Wash 293 11/16/46

Whitney and Co

NRC 17173

Date of Shipment

Conn Line Reference

Previous Waybill Reference

Original Car Initials and Number

Plugs in Vents Closed to Destn

Number of Packages, Articles and Marks

Weight

Rate

Freight

Advances

Total

000 CTNS 48 1/2 FLAT CANIED CHUM SALMON

SLC

66000

93

61380

61380

DEC 1946

TAX 18

632

PAYMENT MADE
DEC 8 1946
MAIL CHARGE
W. W. TAYLOR

Shipment Location

Received Payment

Date

Agent

Weight Symbol

L.C.L. FREIGHT

TOTAL PREPAID

TOTAL

For use at Junction Points on Freight subject to connecting line settlement. Junction Agents will, on connecting line transfers, indicate by symbol how weight was obtained.

EXHIBIT B



05383

**BONDED WAREHOUSE
185 SPRING ST., S. W.
ATLANTA, GEORGIA**

Date _____

2192

EMPLOYEE NAME NO.

For

1

I

QUANTITY	DESCRIPTION	PRICE	TOTAL
100	481 Tack		
	Parakee, Shog		
	Next Check 1600		
	May be more		
	Parakee, Shog		

Solomon

100-443886-100

#256

EXHIBIT C

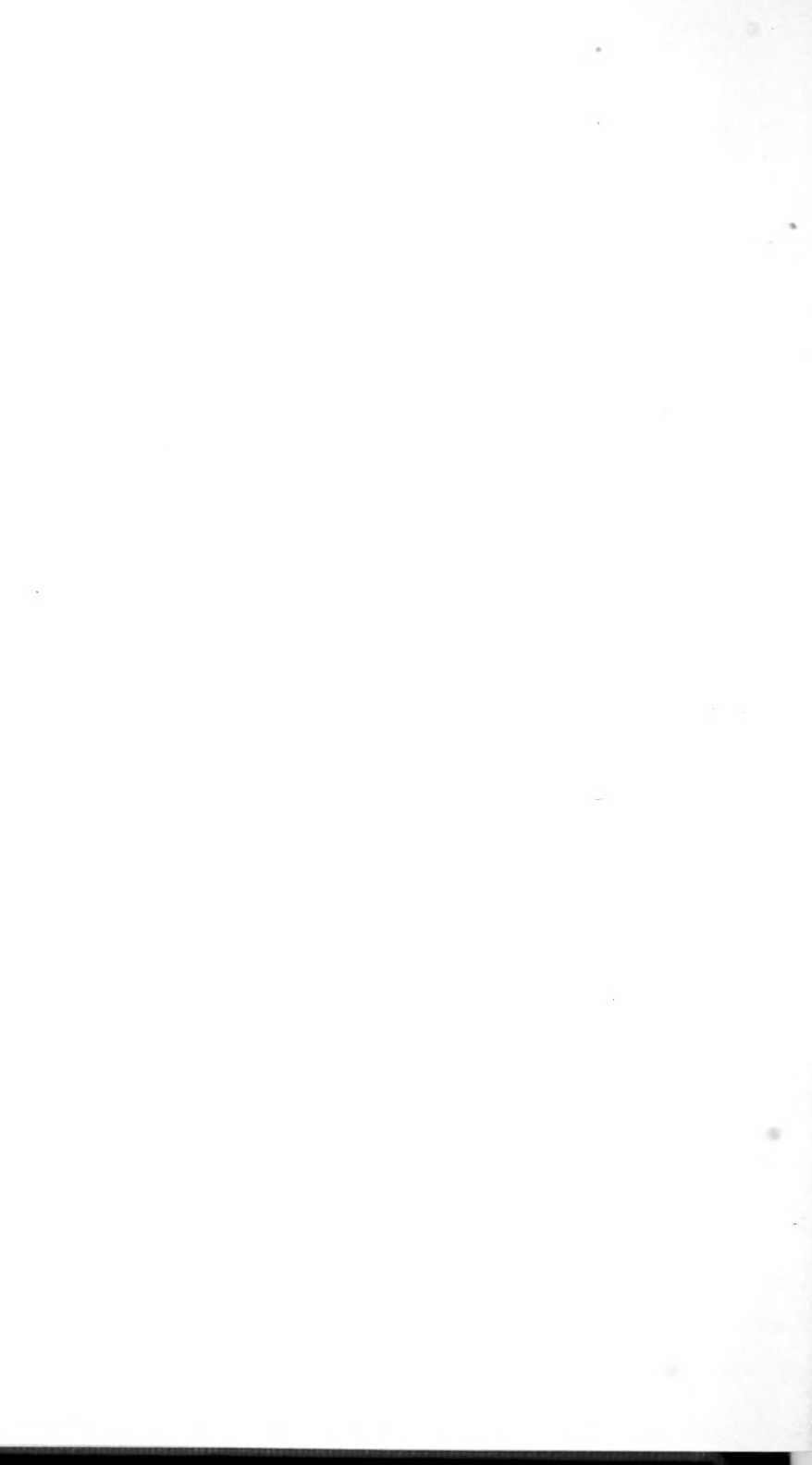


Exhibit D

Western Union
[Telegram]

Atlanta, Ga.

July 16, 1947.

Whitney & Company
860 Central Bldg
Seattle, Washington.

Rephone yesterday you confirmed car tall Golden Shore Neutral Chums immediate shipment this week please expedite shipping car quickly possible increase all available this car or we can handle another car if for immediate shipment this week making two cars 1050 cases each car wire answer quick quantity confirming date cars will depart from Seattle.

CHRISTIAN BROKERAGE
COMPANY.

Paid Night Letter
Chg CB Co.

#257

Exhibit E

[Telegram]

1947 Jul 17 PM 7 39

QE97 TA21

T.EAC 136 NL PD—Seattle Wash 17
Christian Brokerage Co.

185 Spring St. SW Atlanta Ga.

Retel will not have more than minimum car tall Chums this absolutely all available present time will

give you another car soon as some arrives from
Alaska car will be shipped this week.

WHITNEY & CO.

#258

Exhibit F

Western Union

[Telegram]

1947 Jul 23 PM 11 07

QC59 TA 88

T.EAB299 NL PD—Seattle Wash 23

Christian Brokerage Co.

187 Spring St. Southwest Atlanta Ga.

Shipped car Chums Car No NP27571 routed NP
Southern delivery approximately 1110 cases.

WHITNEY & CO.

[In Pencil]: 1110

7-23

960

150

NO NP 27571 NP 1110.

#259

Exhibit G

Whitney & Company
Distributors and Factors
Canned Salmon
860 Central Building
Seattle 4

July 24, 1947

Christian Brokerage Co.
187 Spring St. SW
Atlanta, Ga.

Gentlemen:

Enclosed herewith are copies invoice and bill of lading covering shipment to you in Car NP27571. Please be advised that we have drawn draft on you in the amount of \$18,298.50 as of this date.

Trusting this is satisfactory to you, we remain

Yours very truly,

WHITNEY & COMPANY.

/s/ SAM RUBENSTEIN.

R.

RM

Encl:

#260



DUPLICATE

49

WHITNEY & COMPANY

CANNED SALMON

SALES AGENTS

CANNED TUNA

CENTRAL BUILDING
SEATTLE

754
8/4/41

SR

lley & Co.
Christian Brokerage Co.
7 Spring St. SE
Atlanta, Ga.
CONTRIBUTION TO:

DATE
ROUTED

CAR NO. OR S. S.

TERMS

913
1109
1/27-

SIZE	BRAND	GRADE	PRICE
------	-------	-------	-------

40/10 Tall

WILD & BIRD BRAND

1109
1/27-

1.50 15,775.50
274.48
18,024.02

THIS IS ALSO BILLING.....

*Am sure you understand
necessity for this, please*

carb

Paid
8/3/41

OK 4454

SHIPPING	CONTRACT	INVOICE
ORDER NO. 26	NO	NO

38

#261



WHITNEY & COMPANY
C. ED SALMON 77688

DRAFT NO. W60

Less 1st 30 DAYS (\$274.48)

Seattle, Washington July 26, 1947

Pay to the order of WHITNEY & COMPANY \$18,298.50

REGISTERED 245262 X 182502 50073

Documents attached: Invoice, Order Bill of Lading

To Christian Brokerage Co.
187 Spring St. SW
Atlanta, Ga.

WHITNEY & COMPANY

Present through *[Signature]*

[Signature]

EXHIBIT I

*Draft - Whitney & Co.
18,298.50
less 274.48
18,024.02*

CHRISTIAN BROKERAGE CO.

187 Spring St. S. W.
ATLANTA 3, GA.

No. 43

ATLANTA, GA.

Aug 4,

PAY TO THE ORDER OF

The First National Bank

\$18,024

Eighteen thousand twenty-four & 02/100

Doi.

NORTHWEST BRANCH

TO THE BANK OF ATLANTA

64-24
610

ATLANTA, GEORGIA

CHRISTIAN BROKERAGE CO.

Goa

21

EXHIBIT J

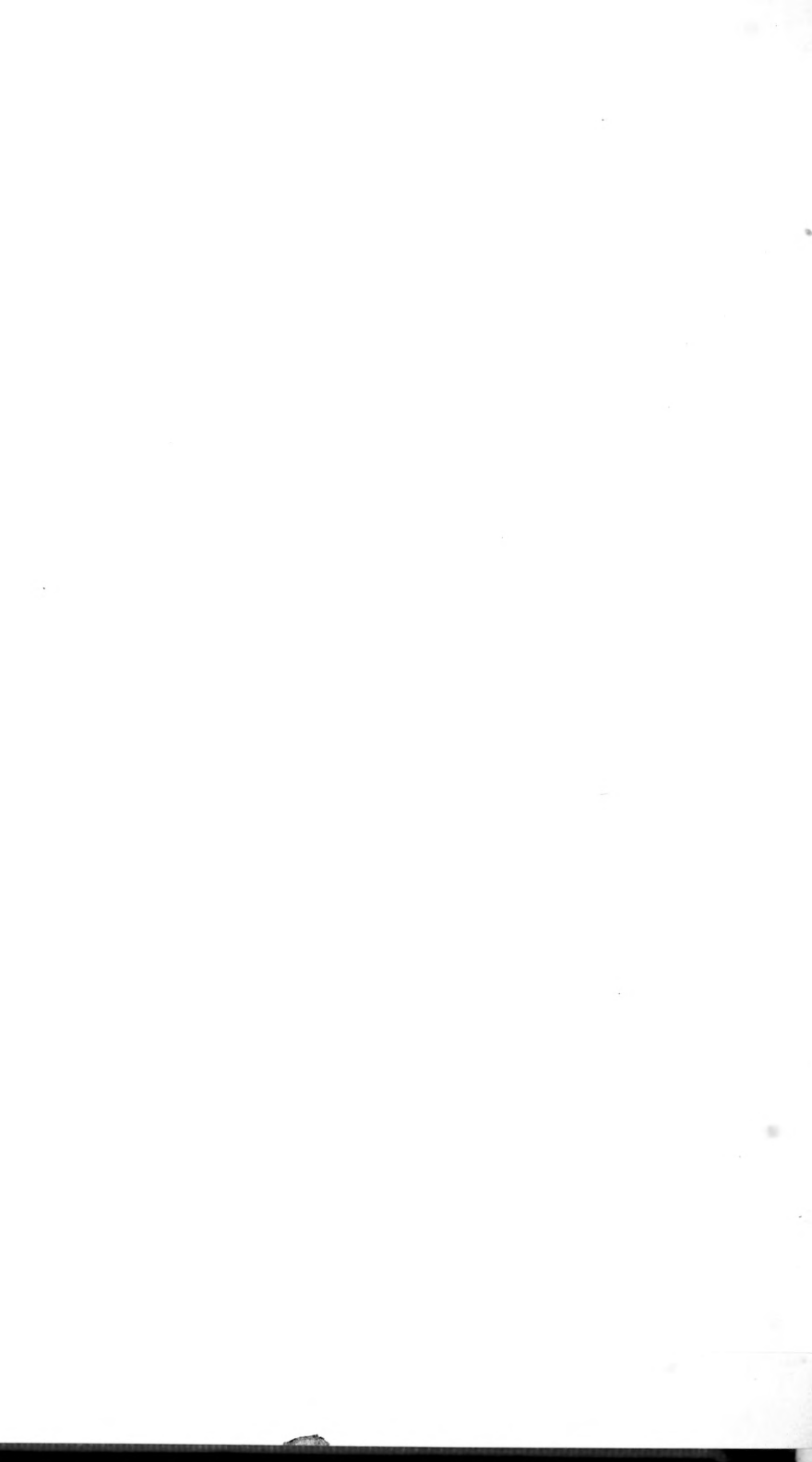


Exhibit K
Confirmation
Christian Brokerage Co.
Merchandise Brokers
185-187 Spring Street, S. W.
Atlanta, Ga.

No. 754

Date Aug. 6, 1947

Sold to..... Address.....

For account of Whitney & Co., Seattle, Wash.

Special Instructions.....

Car No. and Initial NP 27571 Route.....

Time of Shipment.....

Order Taken by.....

Terms of Sale.....

From Mr.....

We are not responsible for any claims beyond our control. Such claims must be made against seller.

Specifications: 1109 Cs. 48/1 Tall "Golden Shore"

Chum Salmon

13cs for RR.

CHRISTIAN BROKERAGE CO.

By /s/ H. L. SCORBOROUGH.

Accepted by 8-6-47.

#264



ORIGINATOR'S NAME AND ADDRESS
 NP SEATTLE WASH 7-23-47 3262
 DATE AND DATE OF SHIPMENT
 ORIGIN LINE REFERENCE
 ORIGIN LINE REFERENCE
 ORIGIN LINE REFERENCE
 ORIGIN LINE REFERENCE

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
1109 CTN 48/1 TL GOLDEN SHORE CHUM SALMON	68758	101	69446	TX	69446 2083 71529
VT AGT WFB EX PIER 54 NP CHECKER SEALS W 836786-87					
Origin Location	RECEIVED PAYMENT		L. WEIGHT SYMBOL L. C. L. FREIGHT		TOTAL
Date	Date		L. C. L. FREIGHT		TOTAL
Post or Station	Per		L. C. L. FREIGHT		TOTAL
			L. C. L. FREIGHT		TOTAL

For use at Junction Points on Freight subject to connecting line settlement. This document is not valid for transfer. Subject to carrier's weight and measurement.

1-2-423

EXHIBIT L

D. A. Christian #266
 DATED 2-27-48 125

CHRISTIAN BROKERAGE CO.
 185 SPRING STREET, S. W.
 ATLANTA 3, GA.

ATLANTA, GA. Aug. 13, 1948 No. 4990

Southern Railway Co.
 Twenty hundred fifty dollars & 29/100

NORTHWEST BRANCH
 TO THE BANK OF ATLANTA
 ATLANTA, GEORGIA

CHRISTIAN BROKERAGE CO.
 D. A. Christian

EXHIBIT M

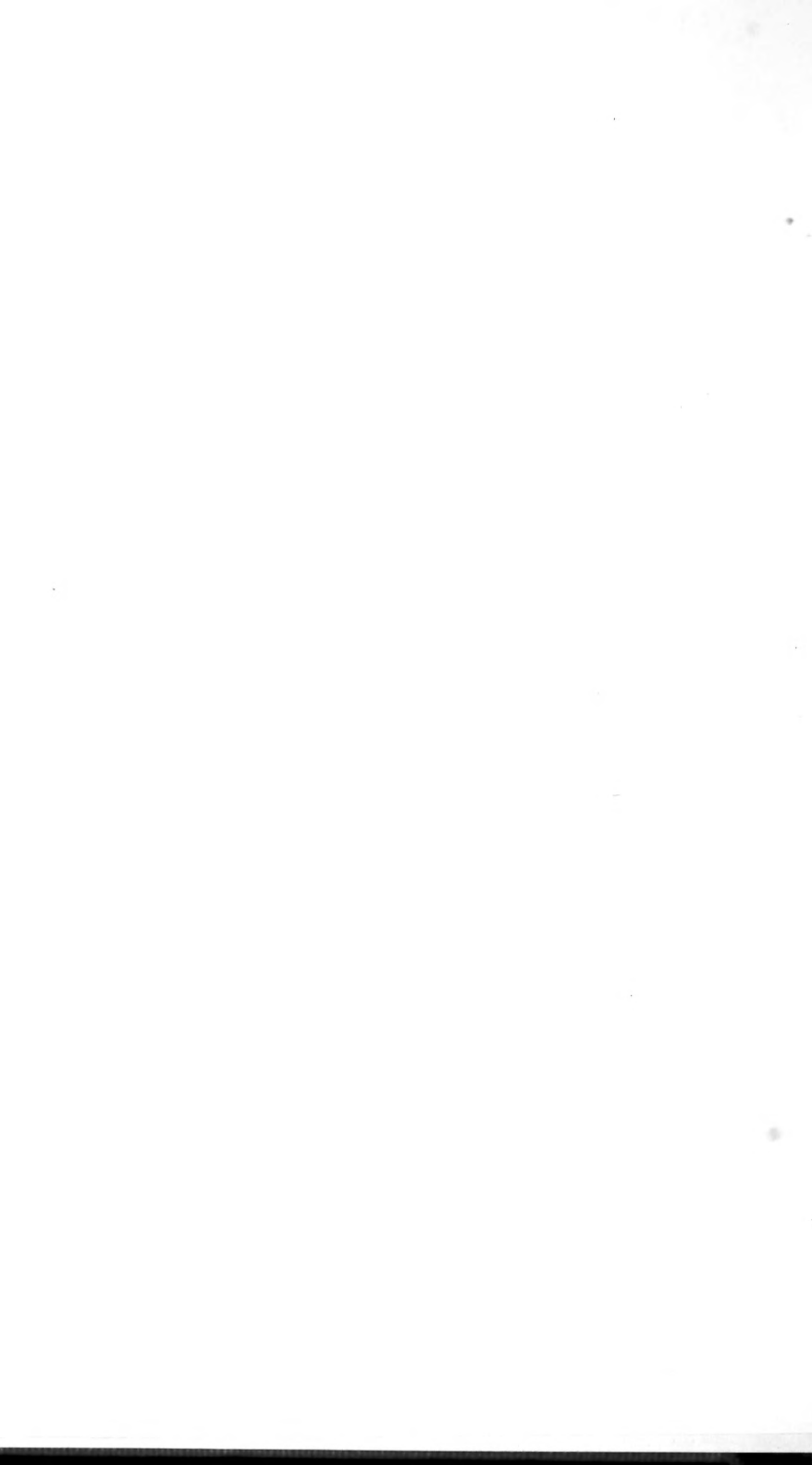


Exhibit N

754

Aug. 6, 1947

Claim #541

Whitney & Co., Seattle, Wash.

NP 27571

8-6-47

HLS

1109 Cs. 48/1 Tall "Golden Shore" Chum Salmon

38 cs had to be recased.

9 cs had to be reworked.

13 cs for RR. bad order.

Total 60

The bad order were all through the car. There were no brace in the door.

#268



DUPLICATE

53

WHITNEY & COMPANY

CANNED SALMON

SALES AGENTS

CANNED TUNA

CENTRAL BUILDING
SEATTLE

Whitney & Co.
c/o Christian Brokerage Co.
107 Spring St. SE
Atlanta, Ga.
FOR DISTRIBUTION TO:

DATE July 22, 1947
ROUTED AT VINE TYP. - CHAS. SCHULZ

CAR NO. OR S. S. 277572

TERMS 2 1/2 % ADV. DATE FOR CASH

274.48

QTY	DESC	GRADE	PRICE
9 ctn.	42/24 TALL	WHOLE BONELESS CHAS. SALMON	1109 16.50 18,294.00

net 18,024.00 ✓

Broker -
\$450 60

(!) 11
5/11/47

#269

EXHIBIT O

43
#270

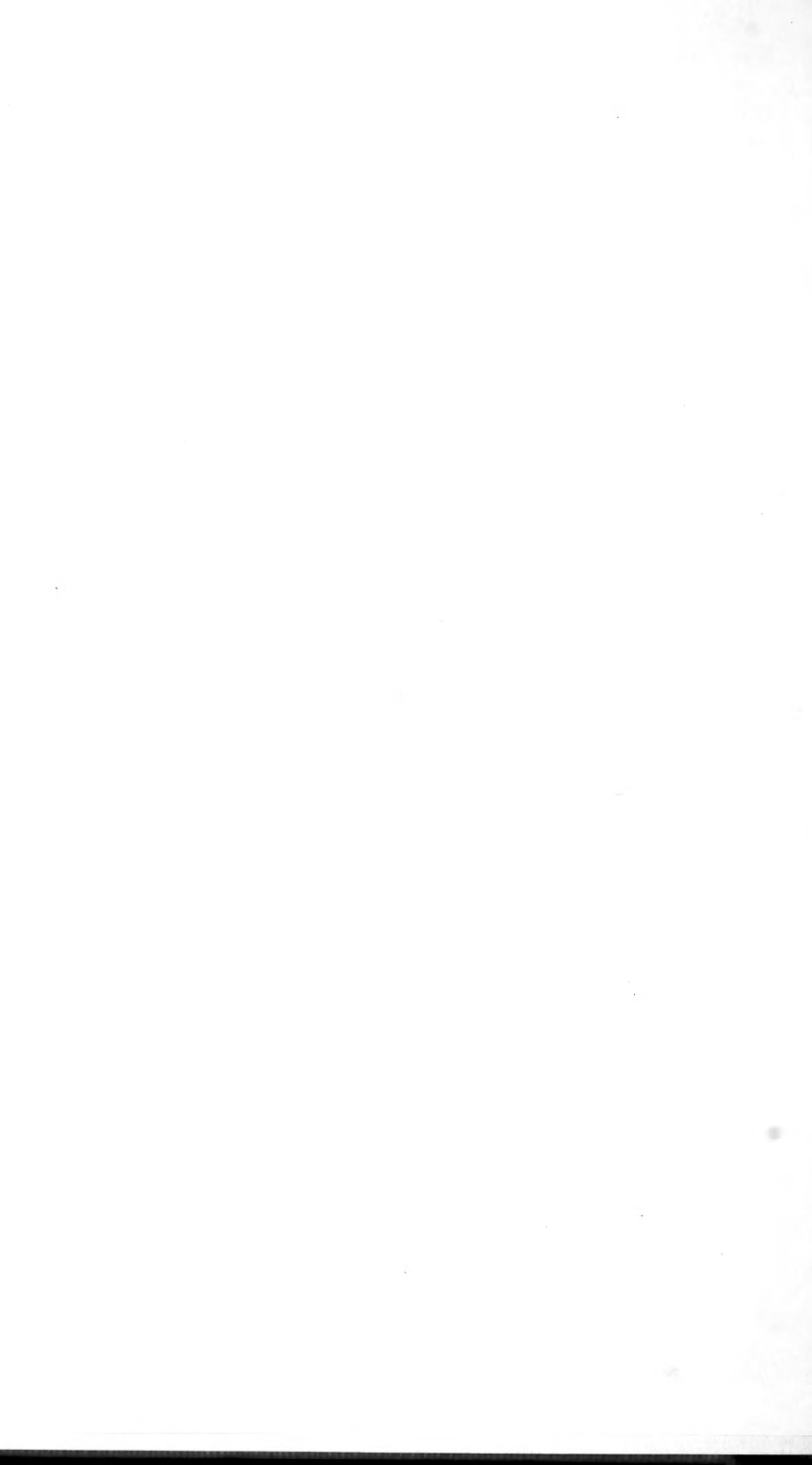


Exhibit P

Brokerage Received by Christian
During Calendar Year 1947

8/11/47—Whitney & Co. 450.60

[Endorsed]: Filed Sept. 29, 1950.

[Title of Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS
UPON WHICH IT INTENDS TO RELY

To: Paul P. O'Brien, Esquire, Clerk of the United
States Court of Appeals for the Ninth Circuit.

Now Comes the Federal Trade Commission, petitioner, by James W. Cassedy, its attorney, and, pursuant to subdivision 6 of Rule 19 of Your Honorable Court, herewith files its statement of the points upon which it intends to rely in support of its application for a decree of enforcement in the above styled cause:

I.

The Findings as to the Facts, issued by the Commission on the 25th day of March 1946, is based upon and supported by incontrovertible, competent, substantial evidence, was properly made and supports the conclusion of the Commission that respondents had violated Section 2(c) of the Clayton Act, as amended;

II.

The Cease and Desist Order issued by the Com-

mission on the 25th day of March, 1946, is based upon the conclusion that respondent had violated the law as charged in the complaint, is fully supported by the aforesaid Findings as to the Facts, was properly entered, is legal and binding on respondents, and, since the date of its issuance, has been, and is now, in full force and effect;

III.

Respondents have failed, neglected and refused to obey the Cease and Desist Order, issued on the 25th day of March 1946, as aforesaid, in that: On or about the 2nd day of December 1946 and on or about the 11th day of August 1947, respondents violated said order by paying Christian Brokerage Company of Atlanta, Georgia, prohibited brokerage on purchases made by Christian in its own name and for its own account.

Dated at Washington, D. C., this the 22nd day of September, A. D., 1950.

FEDERAL TRADE COMMISSION,

By /s/ JAMES W. CASSEDY,
Associate General Counsel,
Attorney for Petitioner.

[Endorsed]: Filed Sept. 29, 1950.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE OF STATEMENT
AND DESIGNATION

I, the undersigned, James W. Cassedy, an Associate General Counsel of the Federal Trade Commission, petitioner in the above styled cause, and its attorney of record, do hereby certify that on the 22nd day of September, 1950, pursuant to subdivision 6 of Rule 19 of this Honorable Court, I caused to be forwarded to Whitney & Company, a corporation, James R. O'Brien, its president, Charlotte E. Jung, its vice president, and Sam Rubenstein, its secretary and treasurer, and James R. O'Brien, an individual, by first-class, registered mail, postage prepaid, addressed to their principal office and place of business located at 860 Central Building, Seattle, Washington, a true and correct copy of:

1. Petitioner's Statement of Points to be Relied Upon; and

2. Petitioner's Designation of the Parts of the Record Material and Essential to the Consideration of the Question Raised in the Above Styled Matter.

Dated at Washington, D. C., this the 22nd day of September, 1950.

/s/ JAMES W. CASSEDY.

Associate General Counsel, Attorney for Federal
Trade Commission.

Subscribed and sworn to before me this 22nd day of September, 1950.

[Seal] /s/ OLIVER E. McADAMS,

Notary Public for the District
of Columbia.

My commission expires the 14th day of August, 1954.

[Endorsed]: Filed Sept. 29, 1950.

[Title of Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF PARTS
OF THE RECORD TO BE PRINTED

To: Paul P. O'Brien, Esquire, Clerk of the United
States Court of Appeals for the Ninth Circuit.

Now Comes the Federal Trade Commission, petitioner, by James W. Cassedy, its attorney, and, pursuant to subdivision 6 of Rule 19 of Your Honorable Court, hereby designates the following parts of the record which are material and essential to the consideration of the question raised in the above styled cause:

1. Complaint issued by the Federal Trade Commission dated the 12th day of February, A. D., 1945 (F.T.C. Docket No. 5279).

2. Answer of respondents dated the 11th day of December 1945 (F.T.C. Docket No. 5279).

3. Federal Trade Commission's Findings as to

the Facts and Conclusion, dated the 25th day of March, A. D., 1946 (F.T.C. Docket No. 5279).

4. Federal Trade Commission's Order to Cease and Desist, dated the 25th day of March, A. D., 1946 (F.T.C. Docket No. 5279).

Dated at Washington, D. C., this the 22nd day of September, A. D., 1950.

FEDERAL TRADE
COMMISSION,

By /s/ JAMES W. CASSEDY,
Associate General Counsel,
Attorney for Petitioner.

[Endorsed]: Filed Sept. 29, 1950.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENTS TO APPLICATION
FOR ENFORCEMENT OF ORDER
TO CEASE AND DESIST

Come now respondents by and through their attorneys and for answer to the application for Enforcement of order to Cease and Desist state as follows:

1. Respondents admit the allegations contained in paragraph I except that respondents state that the officers of Whitney & Company, a corporation, are Sam Rubenstein, President; E. G. Wilson, Vice-President; C. E. Jung, Secretary; and R. M. Mc-

Kinley, Treasurer; and that James R. O'Brien is not an official nor is he employed by Whitney & Company.

2. Respondents admit the allegations contained in paragraph 2 of said Application.

3. Respondents admit the allegations contained in paragraph 3 of the Application.

4. Respondents admit the allegations contained in paragraph 4 of the Application.

5. Respondents admit the allegations contained in paragraph 5 of the Application.

6. Respondents deny the allegations contained in paragraph 6 of said Application, including the allegations and conclusions of fact set forth in sub-paragraphs (a) and (b) thereof and deny that the transactions set forth in sub-paragraphs (a) and (b) of said paragraph 6 constitute or are typical and representative of sales made in interstate commerce in which respondents have violated the cease and desist order referred to. Respondents further state that the canned salmon referred to in sub-paragraphs (a) and (b) of said paragraph 6 was not sold by Whitney & Company to Christian Brokerage Co., but was in fact sold to various buyers by and through Christian Brokerage Co. acting as broker and not as buyer.

Wherefore, respondents having fully answered the Application for Enforcement of Order to Cease and Desist of petitioner pray that said application

be dismissed and that respondents be afforded such other relief as may be just and proper in the premises.

Respectfully submitted,
BOGLE, BOGLE & GATES,

/s/ [Indistinguishable.]
Attorneys for
All Respondents.

[Endorsed]: Filed Dec. 15, 1950.

ORDER TO SHOW CAUSE
No. 12700

United States of America—ss.

The President of the United States of America
To Whitney & Company, a Corporation; James R.
O'Brien, President; Charlotte Jung, Vice-Pres-
ident; Sam Rubenstein, Secretary and Treas-
urer, and James R. O'Brien, Individually, 860
Central Bldg., Seattle, Washington.

Greeting:

Pursuant to the provisions of Subdivision (c)
of Section 45, U.S.C.A. Title 15, and 15 U.S.C.,
§21, you and each of you are hereby notified that on
the 29th day of September, 1950, a petition of the
Federal Trade Commission for enforcement of its
order entered on March 25, 1946, in a proceeding
known upon the records of the said Commission as

“In the Matter of Carl Rubenstein, etc., Whitney & Company, a corporation, Puget Sound & Alaska Trading Company, Inc., and James R. O’Brien, Fed. Trade Comm. Docket No. 5279,” and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 14th day of November, in the year of our Lord one thousand, nine hundred and fifty.

[Seal] /s/ PAUL P. O’BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Return on Service Attached.]

[Endorsed]: Filed Nov. 24, 1950.

No. 12700

**In the United States Court of Appeals
for the Ninth Circuit**

FEDERAL TRADE COMMISSION, PETITIONER

v.

**WHITNEY & COMPANY, A CORPORATION, ITS OFFICERS
AND JAMES R. O'BRIEN, HIS REPRESENTATIVES,
AGENTS AND EMPLOYEES, RESPONDENT**

**ON APPLICATION FOR ENFORCEMENT OF ORDER TO CEASE AND
DESIST**

BRIEF FOR PETITIONER

**FEDERAL TRADE COMMISSION,
By W. T. KELLEY,**

General Counsel,

JAMES W. CASSEDY,

Assistant General Counsel,

JNO. W. CARTER, Jr.,

Attorney,

Attorneys for Federal Trade Commission.

FILED

APR 10 1951

PAUL J. O'BRIEN,

CLERK

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AUTHORITIES CITED

Cases:

<i>Biddle Purchasing Co. v. Federal Trade Commission</i> , No. 15624 (Order of June 5, 1941), not reported.....	26, 27
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12700

FEDERAL TRADE COMMISSION, PETITIONER

v.

WHITNEY & COMPANY, A CORPORATION, ITS OFFICERS,
AND JAMES R. O'BRIEN, AN INDIVIDUAL, AND HIS
REPRESENTATIVES, AGENTS AND EMPLOYEES, RESPOND-
ENTS

*ON APPLICATION FOR ENFORCEMENT OF ORDER TO CEASE AND
DESIST*

BRIEF FOR PETITIONER

I

INTRODUCTION

This proceeding, instituted pursuant to the provisions of Section 11 of the Clayton Act (38 Stat. 734; 15 U. S. C. 21), arises upon the application of the Federal Trade Commission, petitioner, for a decree requiring respondents Whitney & Company, a corporation, and its officers, and James R. O'Brien, an individual, and his representatives, agents, and employees, to obey a certain order to cease and desist

entered against them by the Commission on March 25, 1946.¹

On February 12, 1945, the Federal Trade Commission issued and duly served upon the respondents a formal complaint (R. pp. 3-11) charging respondents with having violated Section 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526, 1527; 15 U. S. C. 13 (c)). On February 26, 1945, respondents filed their original answer, but on January 8, 1946, withdrew it and filed in lieu thereof a substitute answer dated December 11, 1945, in which they admitted "each and every material allegation of fact set forth in" the complaint and waived "all intervening procedure, including hearings as to the facts, Trial Examiner's Report, and the filing of briefs and oral argument" (R. pp. 15-18). Respondents averred, however, that they had discontinued the unlawful practices and had no intention of resuming such practices.

On March 25, 1946, the Commission made its report (R. pp. 19-26) setting forth therein its findings as to the facts which accord with the allegations of the complaint, concluded (R. pp. 25-26) that respondents had violated Section 2 (c), and issued and duly served its order (R. pp. 27-29) to cease and desist from:

¹ The order also ran against Puget Sound & Alaska Trading Company, Inc., and its officers, and Carl Rubenstein, individually and as a copartner trading as Carl Rubenstein, and their respective representatives, agents and employees. Puget Sound & Alaska Trading Company, Inc., was dissolved on December 31, 1946, and Carl Rubenstein died March 19, 1947; therefore, they are not made parties to this proceeding.

paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, upon purchases made for such buyer's own account.

Thereafter, on April 19, 1946, respondents filed their report of compliance stating that they were fully complying with the order of the Commission and were no longer granting or allowing the prohibited commission, brokerage, or discount.

On or about July 10, 1947, the Commission directed its Seattle Office to contact respondents and see if they were complying with the Commission's order. This investigation disclosed that Carl Rubenstein died March 19, 1947; that Puget Sound & Alaska Trading Company was dissolved on December 31, 1946; that Carl Rubenstein (partnership) was incorporated under the laws of the State of Washington in January 1947; and that James R. O'Brien, Charlotte E. Jung, and Sam Rubenstein were President, Vice President, and Secretary-Treasurer, respectively, of corporate respondent Whitney & Company; that respondents had moved their office and principal place of business from 3001 Smith Tower Building, Seattle, Washington, to 860 Central Building, Seattle, Washington.

During the period of time that the Commission had its Seattle Office ascertain if respondents were complying with the order, the Commission had under way an informal investigation of a number of brokerage firms upon informal complaint that the various firms were receiving and accepting brokerage on pur-

chases made for their own accounts. One of these brokerage firms was Christian Brokerage Company of Atlanta, Georgia. Investigation of Christian Brokerage Company developed the fact that this firm was receiving and accepting commission, brokerage or other compensation, allowance or discount in lieu thereof, from various sellers in violation of Section 2 (c) of the Clayton Act, as amended; and resulted in the Commission issuing a complaint charging Christian with violation of the Act. The books and records of Christian disclosed that among the sellers paying Christian unlawful brokerage, or other compensation in lieu thereof, was Whitney & Company, of Seattle, Washington, corporate respondent. Photostatic copies were made of those parts of Christian's books and other records showing the payment to Christian by Whitney of this illegal brokerage. The Commission concluded that these photostatic copies of Christian's books and records were sufficient to establish the fact that respondents here had refused, neglected, and failed to obey the order of the Commission. The Commission therefore filed its pending application (R. pp. 30-39) before the court seeking an enforcement of its order. This proceeding is civil and preventive, not criminal or punitive, and no penalty is authorized or sought to be imposed. The purpose of the Commission's application here is merely to obtain a decree requiring respondents to obey the cease and desist order issued on the 25th day of March 1946.

II

QUESTIONS PRESENTED

1. Whether the Commission's order to cease and desist was properly entered.

2. Whether the Commission's application for enforcement charges respondents with having violated the order to cease and desist.

3. Whether formal proof of violation of the Commission's cease and desist order is necessary to entitle the Commission to a decree of enforcement.

4. Whether the evidence of violation now before the court is sufficient to support an enforcement decree.

III

ARGUMENT

1. The Commission's order to cease and desist was properly entered

A. The statute

Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, provides:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary

is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid. [49 Stat. 1527; 15 U. S. C. § 13 (c).]

B. The facts

The facts as charged in the complaint (R. pp. 3-11) and admitted by respondents in their answer (R. pp. 15-16) and found by the Commission (R. pp. 19-25) may be summarized as follows:

Respondents have their office and principal place of business in Seattle, Washington, and are engaged in the business of packing and in the sale and distribution of canned sea food products. Respondents cause the sea food products sold by them to be transported from the State of Washington to purchasers thereof located in various other States of the United States. Respondents sell their sea food products through legitimate intermediaries who act as their agents and to whom commission and brokerage fees are paid for the services rendered. Respondents also sell their sea food products direct to buyers. Respondents sell their sea food products under their own brand names such as "Bestred", "Farbest", "Blue Bird", "Best Yet", "Red Rambler", "Sprite", "Whitney's Best", "Whitworth", "Golden Shore", "Sea Run", "Northern Gem", and "North View". Respondents also sell such sea food products under brands of their buyers which are different from respondents' brand names and which identify the sea food products with the particular buyer or distributor.

Since June 19, 1936, respondents, in connection with the sale of their sea food products in interstate commerce, have sold such products under their own brands or under the brands of their buyers to direct buyers who purchase such products in their own names and for their own accounts for resale, upon which respondents have paid or granted to such buyers, directly or indirectly, commission, brokerage, or other compensation, or allowances or discounts in lieu thereof.

The direct buyers transmit their own purchase orders direct to respondents, who invoice and ship such orders direct to the buyers and collect the purchase prices from them. Respondents pay such buyers commissions or brokerage fees on such purchases by deducting or allowing from the invoice price an amount equal or approximately equal to the commission or brokerage fees paid by respondents to their regular brokers; or by selling such direct buyers at a net price which reflects brokerage.

These direct buyers do not operate in the manner in which true brokers operate; they are traders for profit, purchasing and reselling the product in their own names and for their own accounts, taking title to the goods and assuming all the risks incident to ownership.

They resell such merchandise at their own prices and terms, not dictated by respondents, and either make a profit or suffer a loss on such resale. The direct buyer purchases from several sellers, including respondents, and purchases where he can obtain the

most favorable price or most favorable commission or brokerage. If the merchandise is lost or damaged in transit, the direct buyer files the claim with the carriers and collects damages from the carriers for his own account. The direct buyer stores the goods purchased in his own warehouses and insures such goods at his own expense or stores such goods in a public warehouse and pledges warehouse receipts and insurance contracts on such products as security for bank loans.

It was upon the basis of the admitted facts, of which the above is a brief summary, that the Commission concluded that respondents had violated and were violating the provisions of Section 2 (c) of the Clayton Act, as amended, and issued its order to cease and desist; all of which is more fully and completely shown in the findings as to the facts (R. pp. 19-26) certified with the record.

In determining whether respondents had violated Section 2 (c) of the Clayton Act, as amended, as charged in the complaint, the court will want to know if the record establishes (1) sales made by respondents in interstate commerce, and (2) payment by respondents of prohibited commission or brokerage on such interstate sales.

C. Interstate commerce

The complaint alleged that since June 19, 1936, each of the respondents "has been and is now engaged in the buying, selling and distributing of canned salmon, canned tuna, canned mackerel and other canned sea food products for their own account for resale" and that respondents "have sold and distributed a sub-

stantial portion of their sea food products * * * to buyers located in States other than" the State of Washington, and as a result of such sales, the sea food products are shipped and transported across State lines (Complaint, Par. Three, R. p. 6).

By their answer dated December 11, 1946, respondents admitted the above allegations of fact as set forth in the complaint (Ans., R. pp. 15-16).

D. Payment of prohibited brokerage or commission

The complaint alleged that in addition to selling their canned sea food products through legitimate brokers or intermediaries, respondents also sell direct to buyers without the use of brokers or intermediaries, such buyers being referred to as direct buyers who purchase in their own name and for their own account for resale. The complaint further alleged respondents paid to such buyers, directly or indirectly, "commissions, or brokerage fees, or allowances or discounts in lieu thereof on such purchases" (Com., Par. Five; R. p. 9).

The complaint then charged that the payment or granting by respondents of commissions, brokerage, or other compensation, or discounts in lieu thereof, to direct buyers was in violation of Subsection (c) of Section 2 of the Clayton Act, as amended (Comp., Par. Six, R. p. 11).

By their answer dated December 11, 1946, respondents admitted the above allegations of fact as set forth in the complaint (Ans., R. p. 16). Further than this, respondents' answer (R. pp. 59-61) to the application for enforcement admits all of the above including Paragraph 5 of the application which alleges that

most favorable price or most favorable commission or brokerage. If the merchandise is lost or damaged in transit, the direct buyer files the claim with the carriers and collects damages from the carriers for his own account. The direct buyer stores the goods purchased in his own warehouses and insures such goods at his own expense or stores such goods in a public warehouse and pledges warehouse receipts and insurance contracts on such products as security for bank loans.

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the Commission's order "since the date of its issuance has been, and is now, in full force and effect."

The Commission and the courts have consistently construed and applied § 2 (c) as an absolute and unconditional prohibition of the payment of commission by sellers to buyers and buyers' agents upon the buyers' own purchases. This is well settled.²

We therefore respectfully submit that the fact that respondents, since June 19, 1936, have been engaged in the sale and distribution of canned sea food products in interstate commerce to direct buyers, purchasing in their own name and for their own account for resale; and that respondents paid to such buyers brokerage or commission in violation of Section 2 (c) of the Clayton Act, as amended, was established in the record by judicial admissions. It is fundamental that "judicial admissions are proof possessing the highest probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to contradict them." *Hill v. Federal Trade Commission*, 124 F. 2d 104, 106 (C. A. 5, 1941).

The Commission's findings as to the facts and its

² *Modern Marketing Service, Inc., et al. v. Federal Trade Commission*, 149 F. 2d 970, 978 (C. A. 7, 1945); *Southgate Brokerage Co., Inc. v. Federal Trade Commission*, 150 F. 2d, 607, 609 (C. A. 4, 1945); *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, 398 (C. A. 1, 1940); *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268, 269 (C. A. 5, 1940), cert. denied 310 U. S. 638 (1940); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 673 (C. A. 3, 1939), cert. denied 308 U. S. 625 (1940); *Oliver Brothers v. Federal Trade Commission*, 102 F. 2d 763, 768, 769 (C. A. 4, 1939); *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687, 692 (C. A. 2, 1938).

order to cease and desist were therefore properly made and properly entered.

2. The Commission's application for enforcement charges respondents with violating its order to cease and desist

Section 11 of the Clayton Act (38 Stat. 734, 735; 15 U. S. C. A. 21) provides that if a respondent "fails or neglects to obey" an order entered under the statute, "while the same is in effect, the Commission * * * may apply to the Circuit Court of Appeals * * * within any circuit where the violation complained of was or is being committed or where such [respondent] resides or carries on business, for the enforcement of its order * * *." It is therefore incumbent upon the Commission, in an application for enforcement, to charge a violation of its order and allege facts showing that its application is filed in the proper court. The application here satisfies those requirements.

The Commission's order to cease and desist directs corporate respondent Whitney & Company and its officers and respondent James R. O'Brien, and his representatives, agents and employees, "in connection with the sale and distribution of canned salmon, canned tuna, canned mackerel, and other canned sea food products" in interstate commerce, to discontinue:

Paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation, allowance or discount in lieu thereof, upon purchases made for such buyer's own account.

In its application for enforcement, the Commission alleged that respondents "are engaged in busi-

ness within the territorial jurisdiction of this court and have their principal place of business at 860 Central Building, Seattle, Washington" (R., pp. 31-32). The Commission further alleged that:

Respondents have failed, neglected and refused to obey the Commission's said order to cease and desist, in that since the 25th day of March 1946, they have continued to pay, grant or allow commission or brokerage, or other compensation or allowance or discount in lieu thereof, to buyers who purchase in their own name and for their own account respondents' canned sea food products for resale (R., p. 34).

The application sets forth in detail two specific sales made by respondents in interstate commerce to Christian Brokerage Company, Atlanta, Georgia, and alleges such sales to be "typical and representative of sales made in interstate commerce in which respondents have violated the cease and desist order issued as aforesaid" (R., pp. 34-37).

The Commission's application, we therefore submit, was properly filed with this court and clearly charges violation by respondents of the Commission's order.

3. Formal proof of violation of the Commission's order by respondents is not a prerequisite to the entry of a decree of enforcement

The jurisdiction of this court to consider and the right of the Commission to file an application for enforcement of the Commission's order is purely statutory. The court has only such authority in reference to the Commission's orders, and the Commission has only such right to apply for an enforce-

ment thereof, as is granted by the express word of the statute. The Act provides two methods whereby jurisdiction over the final orders of the Commission can be acquired by the courts. Each is separate, distinct and independent of the other, seeking entirely different action by, and asking entirely different affirmative relief from, the court, and the jurisdictional requirements vary slightly as to each. One may be initiated by the Commission as in the instant case, seeking enforcement of its order; the other may be initiated by the respondent for the purpose of having the order set aside.

The applicable provisions of the statute (Clayton Act, § 11; 38 Stat. 734-735; 15 U. S. C. 21) in the instant matter are as follows:

If such person [against whom an order to cease and desist has been issued] fails or neglects to obey such order of the Commission * * * while the same is in effect, the commission * * * may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record taken and the report and order of the Commission * * *. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power

to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *.

From the words of the applicable provision, the Commission must determine its right to file an application for enforcement and the necessary steps to be taken thereby to conform with the requirements, and, by the same token, the Court must determine its right to take jurisdiction of such an application and the limit of its powers and duties in reference thereto.

While this case is the first of its kind in this Court, similar proceedings have been before the Second, Fourth, and Seventh Circuits.

The Second Circuit has interpreted the provisions of the Act to require that it first affirm the order of the Commission, and, if valid, refer the matter back to the Commission as Special Master to take evidence upon the question of violation and report to the Court whether the order has been violated. *Federal Trade Commission v. Standard Education Society*, 86 F. 2d 692, 698 (C. A. 2, 1936); *Federal Trade Commission v. Balme*, 23 F. 2d 615, 621 (C. A. 2, 1928), cert. denied 277 U. S. 588 (1928); *Federal Trade Commission v. Jack Herzog & Co., et al.*, 150 F. 2d 45 (C. A. 2, 1945); and *Federal Trade Commission v. Standard Brands, Inc.*, now pending in the Second Circuit,³ Circuit Court No. 21742.

³ In this case prior to filing its application for enforcement, the Commission issued an order directing one of its trial examiners to conduct formal adversary hearings on the question of violation of its order and report to the Commission. Upon completion of the hearings the trial examiner made his report, exceptions were filed

On the other hand, the Seventh Circuit in *Federal Trade Commission v. Standard Education Society*, 14 F. 2d 947, 948 (C. A. 7, 1926), in substance held that the violation of the Commission's order is a condition precedent to the court's taking jurisdiction and that it would not consider the validity of the order until it had been shown to have been violated. However, in *Federal Trade Commission v. Morrissey*, 47 F. 2d 101, 102 (C. A. 7, 1931), the Seventh Circuit in substance held that: "If from proceedings following the entry of the order it is fairly apparent that in some respects the order has not been obeyed, an affirming decree by the court will be justified."

The Fourth Circuit, in considering the same question raised as to procedure on enforcement, agreed with the position taken by the Second Circuit. It accordingly determined the validity of the Commission's order and on the question of violation referred the matter back to the Federal Trade Commission to act as Special Master to take and receive evidence upon this question and report to the court whether the order had been violated. *Federal Trade Commission v. Baltimore Paint & Color Works, Inc.*, 41 F. 2d 474 (C. A. 4, 1930).

Notwithstanding these decisions, we do not believe that the provisions of the Act, either specifically or by normal, logical inference flowing from the words

thereto by counsel and the matter was briefed and orally argued before the Commission. The Commission made a formal report and findings. The record was certified, along with the record upon which the order was based, to the Circuit Court of Appeals in conjunction with and in support of the Commission's application for enforcement.

used therein, require the Commission, as a condition precedent to the granting by the Court of Appeals of a decree affirming and enforcing the order, to prove to the satisfaction of the court that a respondent has violated the order issued by the Commission, and in the present proceeding we respectfully ask this court to consider the Commission's application for affirmance and enforcement of its order as a case of first impression and to determine the question upon the basis of the language used in the Act and legislative history.

As will be seen from the language of the statute (*supra*, p. 13), the statute refers to two separate and distinct, but related, matters: (1) the right of the Commission to file an application for enforcement and (2) the jurisdiction of, and the matter to be determined by, the court upon the filing of such an application. The applicable provision of the statute in reference to the filing of an application for enforcement is as follows:

If such person [against whom an order to cease and desist has been issued] fails or neglects to obey such order of the Commission * * * while the same is in effect, the Commission * * * may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record taken and the report and order of the commission * * *.

Clearly from that language the statute does not in terms specifically require proof of a violation of an order as a condition precedent to the entry of a decree of enforcement. In fact, it neither refers to the authority of the court to enter a decree of enforcement nor to the authority of the court to enter any other decree. It refers solely to the right of the Commission to file its application seeking a decree of enforcement and not to the jurisdiction or power of the court to enter any decree. The jurisdiction and power of the court to enter a decree under such application is found in the next sentence of this statute. And since statutes should be strictly construed, we do not believe that this court can properly, without a difficult stretch of legal interpretation, construe the Act so as to require the Commission to prove violation of its order before it can obtain from this court a decree making its orders effective and binding upon violators of the law. Such a construction requires the Commission to prove a violation of law by the same respondent two separate and distinct times before its order can be made effective; and a third time before the violator of the Act can be punished. Surely Congress had no such plan in mind when it enacted the Federal Trade Commission Act and the Clayton Act in an effort to supplement and strengthen the antitrust laws.

There could be no question as to this were it not for the inclusion of the words "If such person fails or neglects to obey such order". We believe that those words constitute a subordinate clause limiting the words "the Commission * * * may apply".

If these words impose any limitation or condition upon the jurisdiction of the courts then it is a *condition precedent* to the court's jurisdiction. The factual condition referred to must therefore be in existence prior to the filing of an application for enforcement and must not only be affirmatively alleged in such application but must either be proved or the record must affirmatively *establish its existence before a decree of any kind can be entered by the court*. If such factual condition is not established the court would not have jurisdiction and must dismiss the application without entry of a decree of affirmance. In the *Standard Education, Balme and Herzog* cases (*supra*, p. 14), the Second Circuit has taken the position that such words are not a limitation or a condition precedent to the court's jurisdiction, otherwise it had no authority to affirm the orders in those cases. In the *Baltimore Paint & Color Works* case (*supra*, p. 15), the Fourth Circuit adopted the same view of the statute.

The clause, we believe, clearly sets up a condition precedent to the filing of an application for enforcement and not a condition precedent to the entry by the court of an enforcement decree. The question whether the condition exists must therefore be determined before rather than after such an application is filed. This being true, the question whether the order of the Commission has been violated, like the question whether the Commission has reason to believe that the law has been violated before issuing its complaint, necessarily is one for the Commission to determine. The statute authorizes the Commission,

and the Commission alone, to institute enforcement proceedings and it nowhere confers any authority upon the courts to review the Commission's decision to do so or to determine itself whether the order has been violated prior to the entry of a decree of enforcement.

It therefore appears to us that the question whether a respondent has violated the Commission's order is not a judicial, but an administrative, question and one upon which the Commission's determination is conclusive. It is, as we have indicated above, a question of exactly the same character as that which the Act requires the Commission to determine before issuing a complaint, namely, whether there is "reason to believe that any person is violating" the statute (Clayton Act § 11, 38 Stat. 734; 15 U. S. C. § 21). It is well established, and needs no argument, that the Commission's determination of that question is final and not subject to judicial review.⁴ There is no reason to hold otherwise with respect to the question whether the Commission has properly filed an enforcement application, for, as we have already stated, in neither case is the proceeding criminal or punitive. A complaint, issued by the Commission when it has reason to believe that a person is violating the law, can result in no more than an order

⁴ *Hills Brothers v. Federal Trade Commission*, 9 F. 2d 481, 483-484 (C. A. 9, 1926), cert. denied 270, U. S. 662 (1926), cf. *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 385 (1938); *Miles Laboratories v. Federal Trade Commission*, 50 F. Supp. 434, 437 (D. C. 1943), aff'd 140 F. 2d 683, 684 (App. D. C. 1944), cert. denied 322 U. S. 752 (1944); *Perkins v. Endicott Johnson*, 128 F. 2d 208, 225 (C. A. 2, 1942), aff'd 317 U. S. 501 (1943).

to cease and desist, and, an application for enforcement, if such person has failed or neglected to obey such order, can result in no more than a decree commanding obedience to the order. Punishment cannot be imposed for any violation occurring prior to that decree. To punish a violator of the Commission's order, contempt proceedings must be instituted based upon violations that occur after the Court has affirmed the order and commanded obedience to it.

In issuing its complaint and in filing its application for enforcement, Congress, we think, has enjoined upon the Commission the duty of acting reasonably and only upon probable cause, but Congress has left to the sole discretion of the Commission the question whether its action is reasonable and whether probable cause exists. Recognizing its responsibility in administering the Clayton Act, the Commission does not lightly charge any respondent with having violated an order to cease and desist. Before filing an application in a United States Court of Appeals, for enforcement of an order to cease and desist, the Commission conducts a preliminary informal investigation in order to ascertain whether the respondent is obeying the Commission's order. The conduct of the respondent is thoroughly and carefully investigated by members of the Commission's staff and every effort is made to conduct such investigation fairly and impartially. The results of such informal investigation are placed in the Commission's confidential files which are then reviewed by other members of the Commission's staff and by the Commission itself.

In view of the above, we do not believe that the court would be justified in assuming that the Commission will abuse its discretion in this respect. On the contrary, it is to be presumed that the Commission will act with discretion and with propriety, *Perkins v. Endicott Johnson*, 128 F. 2d 208, 225 (C. A. 2, 1942), aff'd 317 U. S. 501 (1943). As the court declared in *Federal Trade Commission v. Baltimore Paint & Color Works*, 41 F. 2d 474, 476 (C. A. 4, 1930):

The Commission alleges in its petition that its order is being violated, and the respect due by the courts to an independent agency of the government forbids the presumption that this allegation of the Commission is not made in good faith and based upon substantial grounds. It is inconceivable that the Commission could make this application to this court without having good ground upon which to make it, and the Commission is certainly to be presumed to be acting in good faith.

That Congress not only did not authorize or grant to the court the right to review the Commission's administrative determination that its order had been violated, but that Congress actually limited and restricted the matters which the court was to review, seems crystal clear from the express provision of the statute. The applicable provision as to the court's jurisdiction and the questions to be determined is as follows:

Upon such filing of the application and transcript the court shall cause notice thereof to

be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *.

The words "Upon such filing of the application and transcript" refer to that portion of the statute, immediately preceding, which is applicable to the Commission's filing its application for enforcement, discussed *supra*, page 14. Reading the two portions of the statute together it will be noted that before the court can acquire jurisdiction three separate and distinct acts must take place: (1) the Commission must file its application for enforcement, (2) the Commission must certify and file with its application "a transcript of the entire record taken and the report and order of the Commission," and (3) the court must cause notice of the happening of (1) and (2) to be served upon respondent. Those are jurisdictional requirements and it is more than significant that Congress did not make "respondent's violation of the order" one of them.

The statute requires the Commission to certify a transcript of the entire record. The only record in existence which the Commission could possibly cause to be transcribed and certified is the record made before it in formal hearings under a complaint charging respondent with violation of the law. That is the record transcribed and certified with the Commission's application here.

When the three jurisdictional requirements, as set out above, have been complied with the statute then provides that “* * * thereupon [the court] shall have jurisdiction of the proceeding and of the question determined therein”. The only “proceeding” that has taken place in which any question involving respondents has been determined was the proceeding before the Commission under formal complaint. The only “question” determined in that proceeding and contained in the certified transcript was whether respondents had violated the law as charged.

It therefore necessarily follows that the word “proceeding” and the phrase “question determined therein” appearing in the language conferring jurisdiction upon the court do not refer to any proceeding on the question of respondents’ violation of the order but refer to the original proceeding before the Commission on the question of violation of law which resulted in the order to cease and desist. That this is true is confirmed by the language that immediately follows: viz “and [the court] shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *.” The only pleading, the only testimony, and the only proceeding in the certified transcript is the proceeding before the Commission on the question of respondents’ violation of law. The court’s jurisdiction is therefore restricted to the legality of the proceedings and the validity of the order and not extended to the question of whether respondents have violated the order. Had Congress

intended that the jurisdiction of the Court of Appeals, under an application for enforcement, should include, not only the legality of the proceedings before the Commission on the question of violation of the law and the validity of the order predicated thereon, but also should include the question of violation of the order, then surely Congress could and would have used language other than that appearing in the Act. *It is the record of the proceeding before the Commission under formal complaint on the question of violation of the law—containing the “pleading, testimony”, report of the Commission and order—upon which the court has “the power to make and enter * * * a decree affirming, modifying, or setting aside the order * * *”, and not a record made subsequent to the entry of the order, subsequent to the filing of the application for enforcement, and subsequently transcribed and certified to the court, upon which the court has authority to make and enter such decrees. The Act just does not so provide.*

Nothing in the statute contemplates that courts shall enter two decrees in a proceeding before it seeking an enforcement of the Commission's order—one a decree “affirming” the order and the other a decree “enforcing” it—and a third decree in a contempt proceeding. Neither is there any language or word used in the Act, nor can there be any reasonable inferences flowing from the language used in the Act which require the Commission to prove two separate violations of the law before it can vitalize its order to cease and desist so as to make it effective in enforcing the statute under which the Commission operates.

On the contrary, the Act clearly contemplates the entry of a single decree in every enforcement proceeding, namely, a decree either "affirming, modifying, or setting aside" the Commission's order. The Act also clearly contemplates that it is only necessary for the Commission to prove once, and only once, by substantial, reliable evidence that respondents have violated the law before the Commission can enter a valid order to cease and desist and upon which the Commission is entitled to a decree from the courts affirming such order. Since the statute does not refer *ipsissimis verbis* to a decree "enforcing" an order, it is obvious that its reference to a decree "affirming" an order means a decree which both adjudges the order valid and commands obedience to it. That this is true is apparent from the fact that the Act refers to the proceeding as one for the "enforcement" of the Commission's order (38 Stat. 735; 15 U. S. C. 21), the statute's provision that the jurisdiction of the Circuit Court of Appeals "to enforce, set aside, or modify orders of the Commission * * * shall be exclusive" and the provision of Section 128 (e) of the Judicial Code that such courts are "empowered to enforce, set aside or modify orders of the Federal Trade Commission, as provided in * * * Section 11" of the Clayton Act (43 Stat. 937; 28 U. S. C. 225 (e)). The decree of this court therefore should be entered, as the statute provides, solely upon the record certified to the Court by the Commission. There is no other record in existence and the Act does not contemplate any other record which might be certified to the court.

This court has held that conduct violative of the Commission's order which the court has merely "affirmed," without specifically commanding obedience thereto, constituted contempt of court. On a petition to set aside the order of the Commission this court in *Pacific States Paper Trade Assn., et al. v. Federal Trade Commission*, 4 F. 2d 457 (C. A. 9, 1925), rehearing denied March 9, 1925, modified and as modified affirmed the Commission's order. Thereafter the Commission filed with this court a petition for rule requiring the Association and others to show cause why they should not be guilty of contempt and punished for violating the court's decree, *Federal Trade Commission v. Pacific States Paper Trade Assn., et al.*, 88 F. 2d 1009 (C. A. 9, 1927). The matter was argued and submitted on stipulation. In a *per curiam* decision the court ordered that the "proceedings be dismissed as to respondents not served, * * * and that other respondents be adjudged guilty of contempt and fined \$10,000 * * *".

On three occasions the Second Circuit has also held respondents in contempt where the court has merely affirmed the Commission's order. Once in *Biddle Purchasing Co. v. Federal Trade Commission*, No. 15624 (Order of June 5, 1941), not reported, and twice in *Leavitt v. Federal Trade Commission*, No. 9037 (Orders of December 24, 1935, and February 4, 1929), not reported. (Contra: *Federal Trade Commission v. Fairyfoot Products Co.*, 94 F. 2d 844 (C. A. 7, 1938).)

Our view that proof of a violation of the Commission's order is not a condition precedent to the

entry of a decree of enforcement is also supported by the courts' practice in proceedings to review and set aside the Commission's orders. In those proceedings, the courts have uniformly entered decrees commanding obedience to valid orders without any inquiry whatever as to whether the orders have been violated.⁵ Yet the statute provides that in such proceeding the courts' "jurisdiction to affirm, set aside, or modify the order of the Commission" shall be "the same * * * as in the case of an application by the Commission * * * for the enforcement of its order."⁶ In view of the very clear provisions of

⁵ *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687 (C. A. 2, 1938), cert. denied 305 U. S. 634 (1938); *E. B. Muller & Co. v. Federal Trade Commission*, 142 F. 2d 511, 520 (C. A. 6, 1944); *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, 400 (C. A. 1, 1940). In the *Biddle* case the court's decree did not, in terms, command obedience to the Commission's order, but merely "affirmed." *Biddle* was later held in contempt of court and fined, however, for continuing the practices which the order enjoined. See the court's order of June 5, 1941, in that case (No. 15624).

⁶ The pertinent paragraph of the statute reads as follows: "Any party required by such order of the Commission * * * to cease and desist from a violation charged may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the Commission * * * be set aside. A copy of such petition shall be forthwith served upon the Commission * * *, and thereupon the Commission * * * forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript, the court shall have the *same jurisdiction* to affirm, set aside, or modify the order of the Commission * * * as in the case of an application by the Commission * * * for the enforcement of its order, and the findings of the Commission * * * as to the facts, if supported by testimony, shall in like manner be conclusive." 38 Stat. 735-736; 15 U. S. C. 21. [Italics supplied.]

the Act, we submit that there is no valid reason for distinguishing between the conditions upon which an enforcement decree will be entered in the two types of proceedings. If the Commission is entitled to a decree of enforcement without proving a violation of its order in one instance, it is equally entitled to a decree of enforcement without the proof of a violation in the other. This court in *Electro Thermal Co. v. Federal Trade Commission*, 91 F. 2d 477, 481 (C. A. 9, 1937), recognized this principle and so held. This case was upon a petition to set aside the Commission's order. In its brief, but not otherwise, the Commission asked for a decree of affirmance and enforcement. Petitioner moved to strike that portion of the Commission's brief upon the ground that it was not properly before the court since a violation of the cease and desist order must be shown before a decree of enforcement can be granted. In its opinion, at page 481, the court set out the provisions of the statute applicable to the filing of an application for enforcement by the Commission and to the filing of a petition to set the order aside by respondent and held that in view of the statute "The Commission's informal prayer for affirmation of the Commission's order is properly here. It appears that the court is vested with plenary jurisdiction no matter which party brings the cause before it. The same language as to the court's jurisdiction is used in one case as in the other." We submit that this is further in support of our contention that the jurisdiction of the court is not based upon and the language

of the statute does not so state a violation of the order by respondents.

Had Congress intended to require the Commission to prove a violation of its order to cease and desist before it could obtain a decree of enforcement, we submit that it would have made that fact clear by including an express provision to that effect, as it did in dealing with the enforcement of orders of the Interstate Commerce Commission and the orders of the Secretary of Agriculture, issued, respectively, under the Interstate Commerce Act⁷ and the Packers and Stockyards Act.⁸ Insofar as here pertinent, each of those statutes provides, as does the Clayton Act, that if any person "fails to obey" an order of the Interstate Commerce Commission or the Secretary of Agriculture, as the case may be, the Commission or the Secretary may institute court proceedings "for the enforcement of such order." But *unlike* the Clayton Act, each statute also expressly provides that prior to the entry of an enforcement decree the court shall determine whether the person complained of "is in disobedience" of the order in question (7 U. S. C. 216; 419 U. S. C. A. 16 (12)). The pertinent sections of the two statutes are substantially identical.⁹

⁷ Act of June 29, 1906, Ch. 3591 § 5, 34 Stat. 584, 591, as amended by an Act of June 18, 1910, Ch. 309, § 13, 36 Stat. 539, 555; 49 U. S. C. 16 (12).

⁸ Ch. 64, § 315, 42 Stat. 159, 167-168; 7 U. S. C. 216.

⁹ We quote the Packers and Stockyards Act as illustrated: "If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby,

It appears to us, therefore, that the omission of a similar provision from the Clayton Act is not only significant but was intentional. That this is true is evident from the fact that the Interstate Commerce Act antedated the Clayton Act by over eight years, and Congress was, presumably, fully familiar with the provisions and history of the earlier statute at the time it enacted the later. This conclusion, as well as our view that proof of a violation of an order to cease and desist is not a condition precedent to the entry of a decree of enforcement under the Clayton Act, is fortified by the legislative history of the Federal Trade Commission Act as originally enacted, the enforcement provisions of which were virtually identical with those of the Clayton Act (Ch. 311, § 5, 38 Stat. 717, 719, 720). Dealing with the enforcement of Commission orders entered under the former statute, the statement of the managers on the part of the House declared in the Conference Report on the Act:

The orders of the Commission will be enforceable only through the courts. In order to obtain the speediest settlement of disputed questions, it is provided that the Commission shall apply for the enforcement of its orders

or the United States by its Attorney General, may apply to the District Court for the district in which such person has his principal place of business for enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience to the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives, from disobedience of such order and to enjoin upon him or them obedience to the same" (7 U. S. C. 216).

directly to the Circuit Court of Appeals. The findings of the Commission as to the facts are to be conclusive. The court's function is restricted to passing on questions of law. The court shall determine such questions on the record in the proceeding before the Commission. No new evidence shall be adduced on the hearings in the court except upon good cause shown, and if the court permits the introduction of additional evidence, such evidence will be taken by the Commission and then filed in court with its new or modified findings based thereon. [H. R. Rep. No. 1142, 63d Cong. 2d Sess. (1914) 19.]

To the same effect is the statement made by Senator Cummins on the floor of the Senate in explaining the procedure agreed upon with respect to the enforcement of the Commission's orders. He said:

When the Commission makes its order for the discontinuance of a practice or method of unfair competition, the Commission, if the order is not obeyed, may make an application which is in substance, of course, a suit, through the Circuit Court of Appeals through the appropriate circuit for the enforcement of its order. With the application, it is to file a certified copy of the transcript, including the evidence and the orders that it has taken and made in the case. The Court of Appeals thereupon issues a subpoena or notice to the person or corporation against whom or which the order was issued. It thereupon tries the case, when the pleadings are made, upon the transcript furnished to it by the Commission. In that trial, the findings of the Commission are made

conclusive if supported by testimony as to the facts, leaving the law of the case wholly open to the Circuit Court of Appeals. At the conclusion of their trial it may affirm or reverse or modify the order which the Commission has made.

There is a further provision that if, upon showing, it appears that there ought to be other testimony admitted than that which was received by the Commission, the Circuit Court of Appeals can refer the matter again to the Commission to take such further testimony, which is certified in the same way, and its findings upon further testimony have the same effect as the original findings [51 Cong. Rec. 14768 (1914)].

Although the above-quoted statements relate to the Federal Trade Commission Act, rather than to the Clayton Act,¹⁰ they are nevertheless pertinent in considering the latter and they clearly show, in our opinion, that proof of a violation of the Commission's orders was not intended to be a condition precedent to the entry of decrees of enforcement. The requirement that such proof be made is not conducive to the "speediest" settlement of the questions at issue before the Commission. It greatly expands the "restricted" functions of the courts. It involves a departure from the "record in the proceedings be-

¹⁰ So far as we can find, nothing in the legislative history of the Clayton Act itself throws any light upon the question. But the Clayton Act and the Federal Trade Commission Act are *in pari materia*, they were enacted and approved less than a month apart, and their enforcement provisions, as heretofore stated, are substantially identical.

fore the Commission" and it requires the Commission to prove a violation of the law by the same respondent on two separate occasions. It rejects the explicit intention of Congress that no "new evidence may be adduced on the hearings in court" except under a provision of the statute which the Second Circuit has held does no more than provide for a form of procedure "analogous to a motion for a new trial upon newly discovered evidence." *Fashion Originators Guild v. Federal Trade Commission*, 114 F. 2d 80, 82-83 (C. A. 2, 1940), aff'd 312 U. S. 457 (1941).¹¹

Further evidence in support of our position, we think, is also found in the fact that when the National Labor Relations Act was before it, Congress struck part of an enforcement provision framed in substantially the same language as the corresponding provision of the Clayton Act, and made it clear beyond any possibility of dispute that the Labor Board was not to be required to prove a violation

¹¹ The provisions referred to read as follows in both the Federal Trade Commission Act and the Clayton Act: "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, authority, or board, the court may order such additional evidence to be taken before the commission, authority, or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission, authority, or board may modify its findings as to the facts, or make new findings, which, if supported by testimony, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence." 38 Stat. 720, 52 Stat. 113, 15 U. S. C. 45 (c); 38 Stat. 735, 15 U. S. C. 21.

of its orders before obtaining decrees of enforcement.¹² The Conference report stated in that connection:

Section 10 (e) of the Senate bill provided that "if such person fails or neglects to obey such order of the Board while the same is in effect, the Board may" petition any Circuit Court of Appeals, etc. House Amendment No. 15 strikes out the quoted phrase and substitutes "the Board shall have power to" petition any Circuit Court of Appeals, etc. * * * It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions * * * under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will * * * render a decree enforcing the [Commission's] order. As the majority of courts have declared under the Federal Trade Commission Act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though

¹² See National Labor Relations Act, § 10 (e), 49 Stat. 453, 454; 29 U. S. C. 160 (e); *National Labor Relations Board v. Fickett-Brown Manufacturing Co.*, 140 F. 2d 883, 884 (C. A. 5, 1944). (In a proceeding to enforce an order of the Labor Board "it is the validity of the Board's order when made which is in question, and * * * whether the employer has or has not complied with it is totally irrelevant.") *National Labor Relations Board v. Clinton E. Hobbs Co.*, 132 F. 2d 249, 251-252 (C. A. 1, 1942). ("If the Board's order was proper on the record before it, the Board does not have to litigate in this court issues of fact as to whether the employer has complied with the order, as a condition of obtaining an enforcement decree.")

presently terminated, will not be resumed in the future. If such practice is resumed, there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings. [H. R. Report No. 1371, 74th Cong., 1st Sess. (1935), 5.]

From all of the above, it would therefore seem clear that not only is there no statutory requirement but there is no rule of policy which requires the court to construe the Clayton Act as conditioning the Commission's right to an enforcement decree upon proof of a violation of an order under the Act. And Congress has imposed no such condition with respect to the enforcement of orders entered under the Federal Trade Commission Act as amended.¹³ The most that policy can be said to require is that a respondent be afforded an opportunity for judicial review of the validity of an order against him before he is required to obey it. And that opportunity is in no degree impaired by our interpretation and construction of the statute. Upon hearing of the Commission's application for enforcement, the respondents are entirely free to contest the validity of the Commission's order—in fact, that is the proper and only time (except upon petition for review to set aside) in which the respondent does have an opportunity to contest such validity. The issue raised under an

¹³ It is no longer necessary to institute enforcement proceedings at all under the Federal Trade Commission Act. Unless review of orders issued thereunder is sought within 60 days after their service, they become final, and their violation thereafter is subject to heavy civil penalties (Federal Trade Commission Act, § 5 (c). (g), (1), 52 Stat. 112-114; 15 U. S. C. 45 (c). (g), (1)).

application for enforcement is not the violation of the order by a respondent so as to impose a penalty or sound in damages, but the issue is whether or not the order is valid, upon which basis the court would be justified in commanding obedience thereto. If the order is invalid, the court will set it aside and the matter is at an end—this is true under an application for enforcement as well as under a petition for review. If the order is valid, there is no reason why the respondent should not be required to obey it forthwith, irrespective of whether the order has been violated. Before the Commission can proceed against a respondent to punish for a violation of its order, three things are a prerequisite thereto: (1) A decree of the court affirming the order, (2) and commanding obedience thereto, and (3) a violation of the order subsequent to such a decree. It is this violation, it appears, subsequent to the entry of the decree of the court which necessitates the Commission to prove the violation charged.


We have already indicated that the Commission does not lightly charge a respondent with violation of its orders, but proceeds to investigate such alleged violation as carefully as it is possible to do so, throwing about the respondent every fair means at its disposal to enable the respondent to clearly demonstrate in a manner and by methods and means which would lead a reasonable person to arrive at the conclusion that respondent is not violating the order. We, of course, recognize that notwithstanding these precautions the Commission may be mistaken in its view that a respondent has failed to comply with

an order. But the probability of such error, we suggest seriously, is not great, and in no case is the Commission's conclusion arrived at arbitrarily. Moreover, a respondent can suffer no harm from the entry of a decree of enforcement any more than he can suffer harm from a decree of affirmance. It is respondent's duty to comply with a valid order to cease and desist, and a decree commanding obedience neither deprives him of any right nor does it impose upon him any penalty. Not until he is accused of violating such a decree is respondent, as we have above indicated, subject to punishment, and that accusation, of course, must be based on conduct occurring after the decree was entered and not conduct occurring prior to the application for enforcement.

In the circumstances, no considerations of fairness to respondents justify imposing upon the public the delay and expense involved in requiring the Commission to prove that a valid order to cease and desist has been violated before it will be enforced. We therefore seriously urge this court to carefully analyze the provisions of the Act applicable here, to give careful and thoughtful consideration to the argument here presented, to study the decisions of the Second Circuit, the Fourth Circuit and the Seventh Circuit herein referred to; to consider its former decisions in the *Pacific States Paper* (*supra*, p. 26) and *Electro Thermal* cases (*supra*, p. 28); and after weighing the pros and cons of the entire matter, see if it can come to the conclusion that the position taken by the Commission is correct; that the Act does not specifically require nor did Congress intend

that the Commission must prove a violation of law a second time before the Commission's order can be vitalized by a decree of the court affirming and enforcing it.

It is, therefore, submitted that upon the basis of the Commission's application alone its order here should be affirmed and the respondents commanded to obey it.



4. The evidence of violation of the Commission's order by respondents now appearing in the proceeding is sufficient to support an enforcement decree

A. Respondents have violated the Commission's order to cease and desist

Even though this court decides to follow the procedure of the Second Circuit, or the Seventh Circuit, we submit that there is no necessity for a decree of reference. There is evidence in this proceeding that establishes the fact of violation which will enable the court to enter one decree affirming and enforcing the Commission's order.

Respondents' answer denies that it has violated the order and asserts that the sales referred to and set out in the application as typical examples of violation of the order were not made "by Whitney & Company to Christian Brokerage Co. but was in fact [made] to various buyers by and through Christian Broker-

age Co. acting as broker and not as buyer" (R. p. 60). This, of course, raises an issue of fact.

In the *Morrissey* case (*supra*, p. 15) the Seventh Circuit did not enter a decree of reference. The court stated, at page 102, that the reason it was not following the procedure of referring the question of violation to the Commission was because (1) respondents' answer "failed in an important respect to assert compliance with the order" and (2) respondents' report of compliance setting forth the manner and method of compliance in "some material respects indicates that the order was not, in its entirety, complied with * * *." The court said: "This, in our judgment, will warrant entry of an affirming decree." The court then proceeded to modify the Commission's order and entered its decree enforcing the order as modified.

The instant matter in some respects presents a parallel situation. Respondents' answer "fails in an important respect to assert compliance with the order" and although there is no letter or report of compliance as there was in the *Morrissey* case, there is in the proceeding before this court evidence of facts "following the entry of the Commission's order" which makes it "fairly apparent that" the order has not been obeyed.

The Commission's conclusion that respondents were not obeying the order was based upon the result of an investigation made of Christian Brokerage Company of Atlanta, Georgia. Christian's records disclosed that Christian was receiving and accepting brokerage in violation of the Act. Among other factual mat-

ters disclosed by Christian's records was the receipt by Christian of brokerage from respondents on purchases made by Christian in its own name and for its own account. These records of the various transactions showing the payment by respondents of this brokerage were made by Christian in the usual course of its business and before Christian had any knowledge that the Commission would make an investigation to determine whether Christian was violating the Act or whether respondents were violating the order. Photostatic copies of Christian's records formed the basis for the Commission's application to this court for an enforcement decree and are attached to and made a part of that application.

These exhibits establish the following facts: On November 16, 1946, Whitney & Company, corporate respondent here, sold to Christian Brokerage Company, 2,000 cases of salmon. This salmon was shipped in Car No. NRC 17173. On December 6, 1946, Christian paid the Southern Railway Company the freight charges on this car of salmon by check No. 3931. On December 2, 1946, Christian received from respondent the sum of \$541.75 which Christian earmarked as brokerage. This sum represented 2½% brokerage on \$21,670.00, the net purchase price of this car of salmon to Christian. See Petitioner's Exhibits A and B. Christian resold this salmon to nine of its customers.

Petitioner's Exhibit C is a photostatic copy of an office memo dated July 14, 1947, recording the fact that Christian "bought [from] Whitney & Co. 1050 cases 48/1 Tall Golden Shore [Neutral] Chums or

maybe more Immediate Shipment'' at a price of \$16.50 a case. Petitioner's Exhibit D is a photostatic copy of a telegram dated July 16, 1947, from Christian to respondents confirming a telephone conversation of July 15 in reference to this purchase. Christian asks that Whitney increase the number of cases in the car and advises Whitney to ship another car if possible. Petitioner's Exhibit E is respondents' answer, advising Christian that a minimum car only is available but when shipment arrives from Alaska another car might be available. Petitioner's Exhibit F is a telegram from respondents advising Christian that the salmon had been shipped in Car No. NP 27571. Petitioner's Exhibit G is a letter from respondents to Christian enclosing invoice and bill of lading covering the shipment of salmon and advising Christian of a sight draft drawn on Christian in the sum of \$18,298.50. Petitioner's Exhibit H is a photostatic copy of the invoice as follows:

Sold to Whitney & Co., c/o Christian Brokerage Co., 1,109 cts. 48/1 Tall Golden Shore Chum Salmon @ \$16.50—\$18,298.50.

On the face of this invoice in handwriting appears the following:

Am sure you understand necessity for this procedure.

(Signed) "SR".

This notation in handwriting obviously refers to the fact that the invoice was made out as if this shipment of salmon had been consigned to Christian Brokerage Company for respondents' own account. This is an obvious attempt on the part of respondents

to prevent the record from showing that this carload of salmon was purchased by Christian in Christian's own name and for Christian's own account. There is another notation on this invoice which shows that on August 3, 1947, Christian paid Whitney & Company by check No. 4959 the sum of \$18,024.02, the net cost of this carload of salmon to Christian. This payment is shown by photostatic copy of the check, Petitioner's Exhibit J. Petitioner's Exhibit N is a photostatic copy of Claim No. 541 which Christian filed against respondents for damage to this shipment of salmon. This exhibit shows that there were 60 cases damaged and there is a notation showing that the damage to 13 cases was caused by the railroad and the damage to 47 was caused by improper packing by Whitney. Petitioner's Exhibit O is another photostatic copy of the invoice covering this carload shipment of salmon and on this invoice appears the following notation "net \$18,021.02" representing the net price to Christian of this salmon. There is another notation on this invoice which is as follows:

"Brokg.—\$450.60—C11 8/11/47"

This notation establishes the fact that on the 11th day of August, 1947, Christian received from respondents a check in the sum of \$460.50 which Christian earmarked as brokerage. This sum represents 2½% brokerage on \$18,024.02, the net purchase price to Christian of this carload of salmon.

The most convincing evidence that the two sales here above discussed were *not* sales by respondents to "various buyers by and through Christian * * *

acting as brokers and not buyers'' as alleged by respondents in their answer, is found in the terms of sale appearing on the invoices (Pet's. Exs. "A", "H" and "J"). The terms of sale were:

"1½% Ten Days, FOB Coast"

This 1½% is the usual discount allowed buyers for time payment of their account. This discount was allowed Christian by respondents on these sales and was in addition to the 2½% brokerage. If Christian was acting as a true broker Christian would not have been entitled to, nor would respondents have granted it, this 1½% discount. The 1½% discount for time payment would have been allowed by respondents to respondents' buyers or customers and not granted by respondents to respondents' broker. In addition to this respondents would have drawn sight drafts on each buyer for the amount of each buyer's purchase, less 1½% discount for time payment, and not drawn sight drafts on its broker for the entire purchase price of these two carloads of salmon.

The records of Christian show that Christian resold this carload of salmon at a profit to twenty of its customers.

The evidence speaks for itself. It consists of unimpeachable, silent witnesses—photostated copies of records made at a time when neither respondents nor Christian had any idea that the Federal Trade Commission would investigate these records to determine if respondents were paying Christian brokerage on purchases made by Christian in its own name and for its own account.

As stated (*supra*, p. 15) in proceedings of this nature the Seventh Circuit takes the position that the Commission must show a violation of its order before the court will enter a decree affirming. The Commission believes that the evidence of violation of its order appearing in this proceeding is of a similar nature and quality as the evidence referred to in that court's opinion in the *Morrissey* case; and, like that evidence, is such that this court would be justified in holding, as that court did, that the evidence warranted entry of an enforcement decree.

A decree of enforcement carries no penalty or punishment. If respondents are obeying the Commission's order a decree of enforcement should be of little concern or interest to them. However, if respondents are not obeying the Commission's order a decree of enforcement would have a most salutary effect. Respondents may not be overly concerned or worried about an order of the Commission which has not been affirmed and enforced by the courts; but, respondents are much concerned with and have the deepest respect for a decree of the court making the Commission's order its own and commanding obedience thereto. Such a decree will cause respondents to discontinue immediately such violations, clean their house and conduct their business in a lawful manner.

IV

CONCLUSION

It is, therefore, finally submitted: (1) that the Commission's order to cease and desist is valid, (2) that the Commission's application for enforcement

charges respondents with the violation thereof which is sufficient without evidence to entitle the Commission to a decree of enforcement, (3) that the evidence of violation is shown in this proceeding by unimpeachable photostatic copies of records showing payment by respondents of the prohibited brokerage, and (4) that this evidence is sufficient to warrant and justify a decree of enforcement. The Commission, accordingly, prays that its application be granted and that the court enter its decree affirming the Commission's order to cease and desist and commanding Whitney & Company, its officers, and James R. O'Brien, his representatives, agents, and employees to obey the same and comply therewith.

Respectfully submitted.

W. T. KELLEY,
General Counsel,

JAMES W. CASSEDY,
Assistant General Counsel,

JNO. W. CARTER, JR.,
Attorney,

Attorneys for the Federal Trade Commission.

WASHINGTON, D. C., April 12, 1951.

No. 12700

IN THE
**UNITED STATES
COURT OF APPEALS**

For the Ninth Circuit

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

**WHITNEY & Co., a corporation, Its Officers, and
JAMES R. O'BRIEN, an individual, and His Repre-
sentatives, Agents, and Employees,**

Respondents.

ON APPLICATION FOR ENFORCEMENT OF ORDER TO
CEASE AND DESIST

BRIEF FOR RESPONDENT

BOGLE, BOGLE & GATES,

ROBERT W. GRAHAM,

J. KENNETH BRODY,

Attorneys for Respondents.

**Central Building,
Seattle 4, Wash.**

FILED
MAY 11 1951

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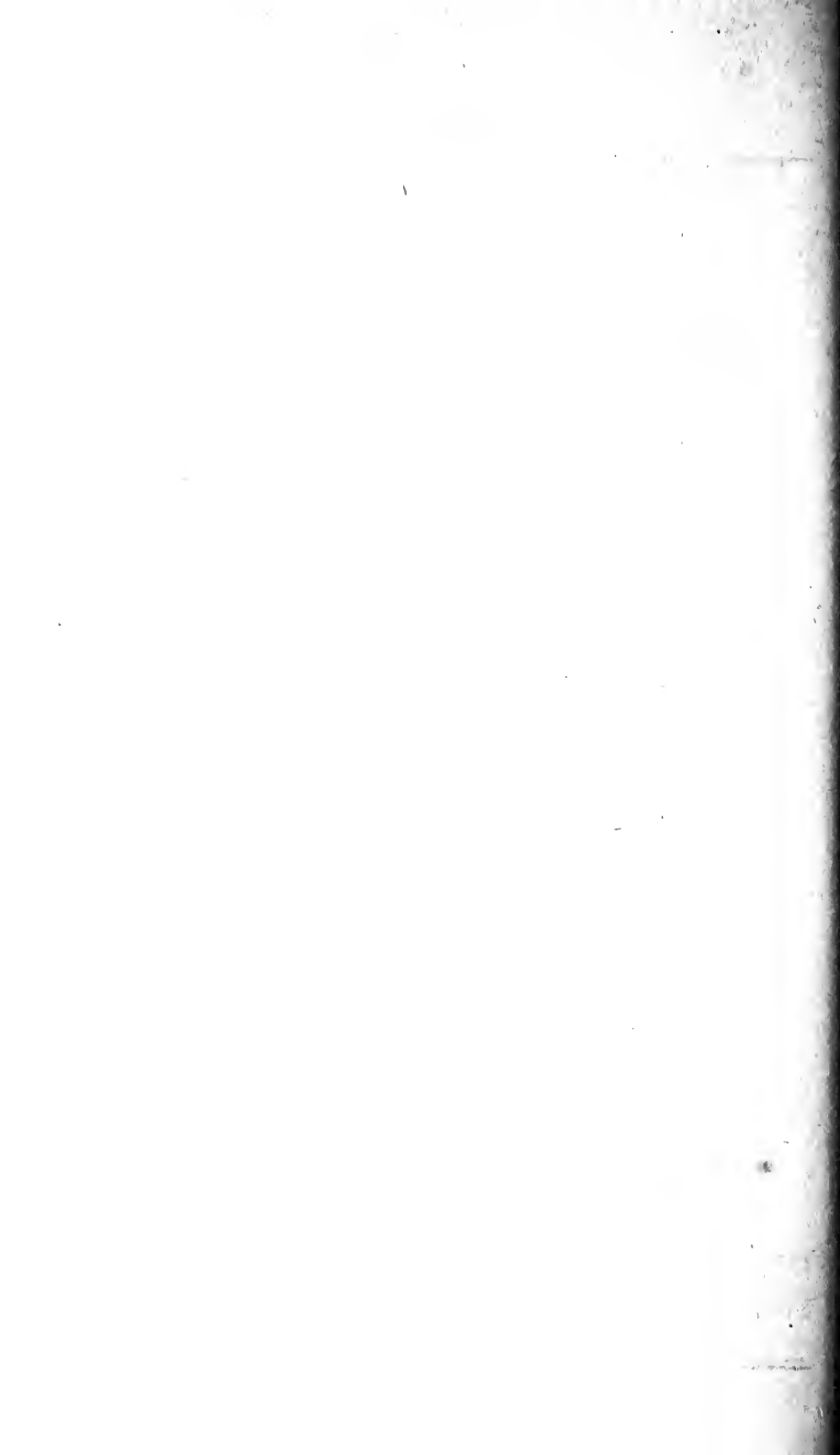
BOGLE, BOGLE & GATES,

ROBERT W. GRAHAM,

J. KENNETH BRODY,

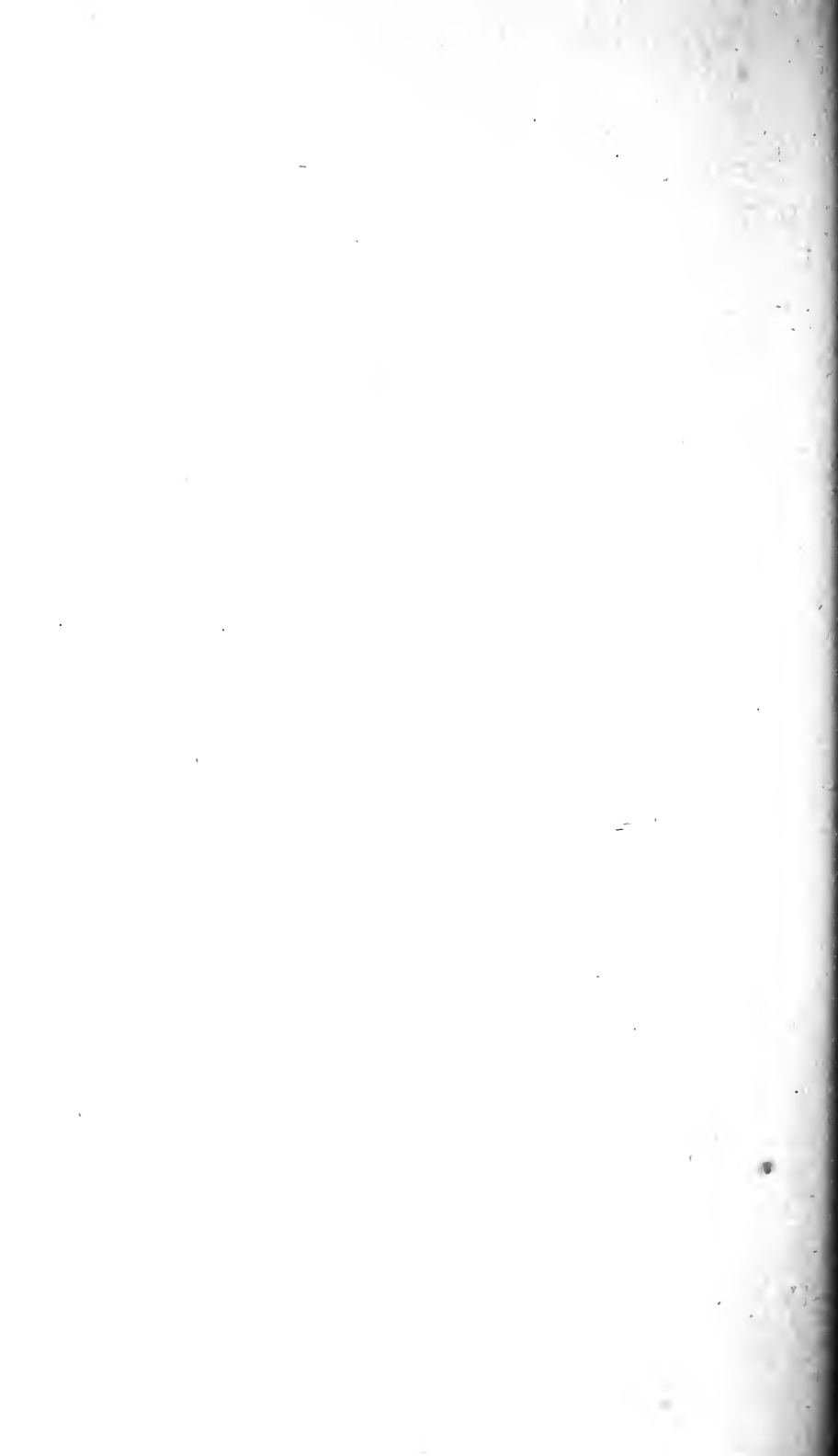
Attorneys for Respondents.

Central Building,
Seattle 4, Wash.



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JAMES R. O'BRIEN, an individual, and His Repre-
sentatives, Agents, and Employees,**

Respondents.

**ON APPLICATION FOR ENFORCEMENT OF ORDER TO
CEASE AND DESIST**

BRIEF FOR RESPONDENT

I.

STATEMENT OF THE CASE

This is a proceeding pursuant to the provisions of Section 11 of the Clayton Act, 15 U.S.C.A. §21, initiated by the application of the Federal Trade Commission, petitioner (R. 30), for a decree enforcing a cease and desist order of the Commission entered March 24, 1946 (R. 27), and commanding respondent Whitney & Co., and its officers and respondent James R. O'Brien, his representatives, agents and employees (hereinafter jointly called respondent) to obey the same and comply therewith (R. 38).

Respondent concurs with the statement of petitioner concerning the issuance on February 12, 1945, by the Federal Trade Commission of a complaint charging violation of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. §13(c) (R. 3; Petitioner's Brief, p. 2). Respondent further concurs with the statements of petitioner concerning the proceedings before the Federal Trade Commission up to and including the issuance and service of the order to respondent to cease and desist from "paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation allowance, or discount in lieu thereof, upon purchases made for such buyer's own account" (R. 28, Petitioner's Brief, p. 2).

On April 19, 1946, respondents filed their report of compliance stating that they were fully complying with the order of the Commission and were no longer granting or allowing such commissions or brokerage. Respondent concurs with the statements of petitioner regarding the dissolution of Puget Sound and Alaska Trading Company, the formation of Carl Rubinstein (partnership), as well as the personnel and office and principal place of business of respondent Whitney & Co. as set forth at page 3 of Petitioner's Brief.

Following the entry of this order, respondent has engaged in numerous transactions with Christian

Brokerage Co. of Atlanta, Ga., and it is the contention of respondents that in all instances such sales of salmon were not made to Christian Brokerage Company as a buyer, but that this salmon was in fact sold to various buyers, by and through Christian Brokerage Company acting as broker and not as buyer.

On September 22, 1950, the Federal Trade Commission issued its application to this court for enforcement of its order to cease and desist (R. 30). In its application, petitioner alleged the corporate existence of Whitney & Co., and its operations in interstate commerce; the issuance of a complaint by petitioner; the filing of an answer thereto; and the issuance of a cease and desist order by the Commission, and its due service and present effect (R. 31-34).

In its application, petitioner further made reference in detail to certain sales of salmon on or about the dates of November 16, 1946, and July 14, 1947, and alleged, in addition to the payment of brokerage commissions by respondent to Christian Brokerage Company, certain facts by which petitioner seeks to conclude that these transactions involved payment of brokerage upon direct sales of salmon by respondent to Christian Brokerage Company in violation of the terms of the cease and desist order previously entered (R. 34-55).

In its answer to the application for enforcement,

respondent has admitted all of the allegations contained in the application, except those contained in paragraph 6, relating to the sales of salmon and the conclusions of fact derived therefrom. Respondent has denied that such sales constituted violations of the cease and desist order and has affirmatively stated that these sales were to various buyers by and through Christian Brokerage Co., acting as broker, but not as buyer (R. 59-60).

Petitioner seeks the immediate issuance of an order of enforcement of the Commission's cease and desist order of March 25, 1946, and a decree commanding respondents to obey the same and comply therewith, without any consideration of the issues tendered by respondent's answer to the application of petitioner; that is to say, without any determination of the issue as to whether or not respondent is in violation of the order sought to be enforced (R. 37-38).

II.

QUESTION PRESENTED

Petitioner has set forth four questions as those presented herein (Petitioner's Brief, p. 5). Concerning the first, respondent does not deny that the order to cease and desist was properly entered. Concerning the second, respondent does not deny that the Commission's application for enforcement charges respondent with having violated the order

to cease and desist. Concerning the fourth, respondent does not believe that this brief is a proper place for an evaluation of evidentiary matter. Respondent is of the further opinion that any attempted evaluation of evidentiary matter such as is asserted by petitioner in its application (R. 34-55) and in its brief (Petitioner's Brief, p. 38-44) can only be made at an appropriate time pursuant to an adversary proceeding at which time respondent shall have the opportunity of its day in court and the opportunity to present such evidence as in the opinion of respondent will demonstrate that petitioner's cease and desist order has not been violated as petitioner alleges.

Respondent therefore believes that the issue presently before the court is substantially correctly stated by petitioner as his third question presented, *viz.:*

Whether formal proof of violation of the Commission's cease and desist order is necessary to entitle the Commission to a decree of enforcement in this proceeding.

III. ARGUMENT

A. FORMAL PROOF OF VIOLATION OF THE COMMISSION'S CEASE AND DESIST ORDER BY RESPONDENT IS NECESSARY TO ENTITLE THE COMMISSION TO A DECREE OF ENFORCEMENT.

1. *Statutory Provisions Involved*

The question presented by this proceeding in-

volves an analysis of jurisdiction of this court over orders of the Federal Trade Commission. Both petitioner and respondent are in agreement that this jurisdiction is purely statutory (Petitioner's Brief, p. 12).

An examination of the underlying statutory provisions reveals that it is imperative in an analysis of this court's jurisdiction over such orders to differentiate as to (a) the party at whose instance the jurisdiction of this court is invoked, (b) the character of the order sought from this court as authorized by the statute involved, and (c) the basic statute pursuant to whose provisions the order of the Federal Trade Commission was originally issued. We submit that petitioner in its brief has failed to clarify the issues here presented because of a confusion in analysis and discussion of authority as to whether (a) the jurisdiction of this court is being invoked by the Commission or by a party against whom a cease and desist order has been issued, (b) the order sought in this court is a decree affirming the original order of the Commission or is a decree of enforcement, and (c) whether the Commission's order involved was issued under the provisions of the Clayton Act (15 U.S.C.A. §§13, 14, 18, 19 and 21), or under the provisions of the Federal Trade Commission Act. (15 U.S.C.A. §§41-58).

From the record herein it is apparent that (a) the jurisdiction of this court is being invoked by the

Commission (R. 30) which seeks (b) from this court "its decree enforcing the 'Commission's' aforesaid order to cease and desist, issued as aforesaid, commanding respondents * * * to obey the same and comply therewith" (R. 38-39), which cease and desist order was issued by the Commission (c) pursuant to the provisions of the Clayton Act (R. 30).

a. *The Clayton Act.*

(i) *Applications for Enforcement Orders by the Commission.*

Respondent and petitioner are in agreement (Petitioner's Brief, p. 13) that the applicable provisions of the statute (Clayton Act, §11; 15 U.S.C.A. §21) which govern applications by the Commission for enforcement orders under the Clayton Act and hence this matter are as follows:

*"If such person (against whom an order to cease and desist has been issued) fails or neglects to obey such order of the Commission * * * while the same is in effect, the Commission * * * may apply to the Circuit Court of Appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record taken and the report and order of the Commission * * *. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the*

question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *"
(Italics supplied)

(ii) *Petitions for Review or To Set Aside by Respondents.*

In the next following paragraph of §11 of the Clayton Act (15 U.S.C.A. §21) there is provided the procedure whereby a respondent before the Commission may petition the Court of Appeals to review and set aside an order issued by the Commission as follows:

"Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive."

It is stated by petitioner (Petitioner's Brief, p. 13):

"The Act provides two methods whereby jurisdiction over the final orders of the Com-

mission can be acquired by the courts. *Each is separate, distinct and independent of the other, seeking entirely different action by, and asking entirely different affirmative relief from, the court, and the jurisdictional requirements vary slightly as to each.* One may be initiated by the Commission as in the instant case, seeking enforcement of its order; the other may be initiated by the respondent for the purpose of having the order set aside." (Italics supplied)

Respondent concurs in this statement with the exception that it may be noted that the "jurisdictional requirement" which "varies slightly" in the statutory provision first above quoted is that "the commission * * * may apply to the circuit courts of appeal * * * for the enforcement of its order"—"*If such person fails or neglects to obey such order of the Commission*" (a condition which finds no counterpart in the statutory provision governing petitions for review by a respondent). We suggest that it is also somewhat difficult to reconcile the above quotation from Petitioner's Brief with Petitioner's contention "In view of the very clear provisions of the Act, we submit that there is no valid reason for distinguishing between the conditions upon which an enforcement decree will be entered in the two types of proceedings" (Petitioner's Brief, pp. 28-29).

b. Federal Trade Commission Act.

Prior to the amendments contained in the Wagner-Lea Act of 1938, the Federal Trade Commission

Act provided for the initiation of enforcement proceedings by the Commission (and also for petitions for review by respondents) of orders issued under this Act in language which was identical with the above quoted provisions of the Clayton Act (*Supra*, pp. 7-8). See *Federal Trade Commission v. Herzog*, 150 F.(2d) 450, 452 (C.C.A. 2, 1945). In 1938 the provisions of the Federal Trade Commission Act relating to *enforcement and review* of Commission orders under that Act were amended to read as follows: (15 U.S.C.A. §45):

“(c) *Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and*

*enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. * * * (Italics supplied)*

* * * * *

“(g) An order of the Commission to cease and desist shall become final—

“(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *”

“(1) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.”

As observed by Petitioner, orders now issued by the Commission under the Federal Trade Commission Act have become, in effect, self-executing and “it is no longer necessary to institute enforcement proceedings at all under the Federal Trade Commission Act. Unless review of orders issued thereunder is sought within 60 days after their serv-

ice, they become final, and their violation thereafter is subject to heavy civil penalties" (Petitioner's Brief, p. 35, note 13).

Of significance may be noted that the companion provisions in the Clayton Act for enforcement and review of Commission orders under the Act, as quoted above, were not amended by the Wagner-Lea Act of 1938. Further it may be pointed out that 15 U.S.C.A. §45(c) as amended specifically provides that in a petition for review of a Commission order under the Federal Trade Commission Act "to the extent that the order of the Commission is affirmed, the court shall thereupon issue its own commanding obedience to the terms of such order of the Commission."

In summary, the statutory provisions governing the jurisdiction of this court over orders of the Federal Trade Commission provide:

(1) Under the Clayton Act

(a) The Commission may make application for the enforcement and review of its order "*if such person * * * fails or neglects to obey such order of the Commission.*"

(b) A respondent may petition to set aside and review an order of the Commission, in which event the question as to whether or not there has been a violation of the order is immaterial and of no concern.

(2) Under the Federal Trade Commission Act.

(a) Prior to 1938 the provisions were the same as under the Clayton Act.

(b) Since 1938 the necessity of seeking enforcement orders by the Commission has been eliminated in view of the fact that there are

now substantial civil penalties provided for failure to obey a final order of the Commission, and upon petitions to set aside or review on behalf of respondents, the court is specifically directed to enter an enforcement order upon that portion of the order affirmed, in which cases as well the question as to violation of the order is not presented and is of no materiality.

2. *The Language of the Statute So Provides*

The basic question before the court is necessarily one of statutory construction. As set forth above, the applicable provision of Section 11 of the Clayton Act state "If such person fails or neglects to obey such order of the Commission * * * the Commission may apply to the Circuit Court of Appeals * * * for the enforcement of its order." Failure to obey the order is therefore the basic condition precedent to the power of this court to enter an order commanding obedience to the order of the Commission.

With a candid disregard of every decided case upon the point (Petitioner's Brief, pp. 15-16), the petitioner seeks to predicate its position upon an exercise in grammatical gymnastics which we respectfully submit would strain the semantics of the most convoluted philologist (See Petitioner's Brief, pp. 15-25, 35-36). The essence of petitioner's contention appears to be that "The clause, we believe, clearly sets up a condition precedent to the filing of an application for enforcement and not a condition precedent to the entry by the court of an en-

forcement decree" (Petitioner's Brief, p. 18).

The language of the statute is merely a clear, logical and chronological description of the conditions required for the circuit court to enter a decree of enforcement. Obviously, the violation must come first in point of time, and then the application for enforcement. And, upon filing of the application and transcript, the court obtains jurisdiction. This court cannot obtain jurisdiction directly upon the violation; and the statute necessarily provides that the violation of the order shall give rise to the filing of an application for enforcement. Even if one of these conditions must necessarily precede the other in time, they are equally vital conditions precedent to the jurisdiction of this court to order enforcement.

Such a statute may not be construed in isolated pieces as petitioner appears to urge. If reading one sentence above produces an interpretation which differs from that produced by reading another sentence, or which differs from that produced by reading the whole, that interpretation must be selected which gives a harmonious, logical, and uniform interpretation to the statute as a whole. We think that petitioners attempted reading of the first sentence of the applicable portion of Section 11 without relation to that which follows is not only without judicial support but violates every canon of statutory interpretation.

3. *The Decided Cases Unanimously So Hold*

Petitioner urges a construction of the applicable provisions of Section 11 of the Clayton Act which would call upon this court to abdicate the judicial responsibility conferred upon it by the statute. Not only would petitioner deprive this court of the duty and responsibility of determining that a violation has occurred as a condition precedent to the issuance of an enforcement order but petitioner's position would deprive this court of the right to inquire into any other jurisdictional prerequisite, such as residence or place of business of respondent, in the event an issue as to the same were tendered by respondent.

The decided cases have unanimously rejected any such construction of Section 11 and have clearly pointed out that there are two issues before the court on an application for enforcement brought by the Commission. First, the court must determine that the order of the Commission sought to be enforced is valid; and, second, the court must determine that there has been a violation of that order. Which of these issues is to be determined first is perhaps of little consequence, the majority rule being that the validity of the order should be first determined. *F.T.C. v. Standard Educational Society*, 86 F.(2d) 692, 698 (C.C.A. 2, 1936); *F.T.C. v. Balme*, 23 F.(2d) 615, 621 (C.C.A. 2, 1928); *F.T.C. v. Herzog et al.*, 150 F.(2d) 450, 452 (C.C.A. 2, 1945);

F.T.C. v. Baltimore Paint & Color Works, Inc., 41 F.(2d) 474 (C.C.A. 4, 1930). Compare *F.T.C. v. Standard Educational Society*, 14 F.(2d) 947, 948 (C.C.A. 7, 1926) holding that the validity of the order would not be determined until the violation of the order had been ascertained; and to the same effect see the concurring opinion of Judge Learned Hand in *F.T.C. v. Balme*, 23 F.(2d) 615, 622 (C.C.A. 2, 1928).

The precise point here at issue under Section 11 of the Clayton Act was decided by the Court of Appeals for the Second Circuit in *F.T.C. v. Herzog*, 150 F.(2d) 450, 452 (C.C.A. 2, 1945) wherein Judge Swan stated:

“The Commission asks us to enter a decree commanding obedience to its order without regard to whether the respondents have violated it. The statute provides, 15 U.S.C.A. §21, that if a person against whom a cease and desist order has been issued ‘fails or neglects to obey such order of the commission * * * while the same is in effect, the commission * * * may apply to the Circuit Court of Appeals * * * for the enforcement of its order * * *.’ This provision is identical with the enforcement provisions of Section 5 of the Federal Trade Commission Act, 38 Stat. 719, before its amendment in 1938, 15 U.S.C.A. §45. In construing those provisions we have held that after determining that the Commission’s order is valid, the question of its violation must be referred to the Commission to take evidence and report on that issue before an enforcement order will be entered. *Federal Trade Commission v. Balme*, 2 Cir., 23 F.(2d) 615, 621, *certiorari* denied 277 U.S. 598, 48 S. Ct. 560, 72 L. Ed. 1007; *Federal Trade Commission*

v. Standard Education Society, 2 Cir., 86 F. (2d) 6982, 698, reversed in part on other grounds, 302 U.S. 112, 58 S. Ct. 113, 82 L. Ed. 141. We are asked to reconsider these decisions, but we see no reason to do so; no contrary decision has been cited. The same procedure has been followed in the Fourth Circuit, *Federal Trade Commission v. Baltimore Paint & Color Works*, 41 F. (2d) 474, 476; and the Seventh has adopted an even stricter rule, namely, that it will not consider the validity of the order until a violation of it has been shown. *Federal Trade Commission v. Standard Education Society*, 14 F. (2d) 947, 948. In the case at bar the violations of the Clayton Act which the Commission found occurred nearly five years ago; its order was issued on July 8, 1942, and its petition for enforcement was not filed until March, 1945. The respondents' answer to the petition asserts that 'at least since July 8, 1942' they have done business only as agents of the sellers of fur garments. Under these circumstances the customary procedure of requiring a hearing on the issue of violation seems especially appropriate.

"The order is affirmed and the proceeding is referred to the Commission as special master to hear and report whether the respondents have violated the provisions of the order."

As indicated above (*Supra* p. 9) Section 5 of the Federal Trade Commission Act prior to the 1938 Amendments was identical with the provisions of Section 11 of the Clayton Act. The Second Circuit had earlier under this statute as well held that a judicial determination of the violation of the Commission order was a condition precedent to the entry of a decree of the Circuit Court commanding obedience to that order. That court held in *F.T.C. v. Balme*, 23 F. (2d) 615, 621 (C.C.A. 2, 1928):

"The order of the Federal Trade Commission, adjudging the respondent guilty of unfair competition, is affirmed; the question of the present violation of section 5, for which enforcement is asked by the petition to this court, is referred to the Federal Trade Commission, with opportunity for the respondent to answer and submit proof, and with directions to the Commission to report its conclusions to this court.

"Ordered accordingly."

Of interest also is the concurring opinion of Judge Learned Hand in this case wherein he states (p. 622):

"I think that we have no jurisdiction to review the Commission's order until we have decided that the respondent has disobeyed it. Section 5 of the act says that, 'if such person * * * neglects to obey such order * * * the Commission may apply to the Circuit Court of Appeals.' That is not to say that the Commission may so apply, if they merely allege that the respondent has disobeyed; it is the fact, not their assertion, which conditions our jurisdiction. Such, at least, is the form of the act, and such the decision of the Seventh Circuit. *Fed. Trade Com. v. Standard Education Soc.* (C.C.A.) 14 F.(2d) 947.

"The answer is that we cannot decide that question, because section 5 confines out inquiry to the proceedings before the Commission up to the entry of its order, and that the respondent's disobedience necessarily occurred theretofore. In the first place, if the fact is a condition on our jurisdiction we have inherent power, like any other court, to decide it, else we could not act at all. In the second, we must decide it at some time anyway, and I can perceive no greater power to act after the order has been valid than before. We are assuming a power in either event not conferred on us in words."

To the same effect see *F.T.C. v. Standard Education Society*, 86 F.(2d) 692, 698 (C.C.A. 2, 1936) wherein Judge Learned Hand states:

“* * * After the order has been amended in accordance with the foregoing, the proceeding will be remitted to the Commission as special master to hear and report whether the respondents have complied with the provisions which are affirmed. The cause will await in this court the return of that report for further proceedings.”

The Seventh Circuit Court of Appeals in *F.T.C. v. Standard Education Society*, 14 F.(2d) 947, 948 (C.C.A. 7, 1926) has likewise held that the issue of violation must be determined judicially prior to the entry of an enforcement order upon application of the Commission, Judge Evans writing for the court:

“If the court is to give any effect to the first sentence of this section, it must recognize the express condition upon which the commission may apply for an enforcement order. It is only in case the respondent ‘fails or neglects to obey such order of the commission while the same is in effect’ that petitioner has any standing in this court. Not only is this the plain provision of the statute, but petitioner’s petition is drawn on this theory. If the allegation such as heretofore quoted from the petition be a necessary one, it follows that such allegation, together with respondent’s denial, presents an issue of fact necessarily determinable before this court can or should act upon the merits of the application.

“* * * It was the apparent intention of the Congress to give the practicer of the alleged unfair methods an opportunity to mend its ways before subjecting it to a decree of court, with its attending embarrassment. To accomplish

this, the act provided that the petitioner could apply for an enforcement order *only* when its order was being neglected or disobeyed. It follows, therefore, that petitioner's motion to strike out the portions of respondent's answer heretofore quoted should be denied."

The Fourth Circuit Court of Appeals has also held to the same effect in *F.T.C. v. Baltimore Paint & Color Works*, 51 F.(2d) 474, 476 (C.C.A. 4, 1930), it being stated:

"The question presented is as to the method of procedure that should be followed by the Circuit Court of Appeals after the Federal Trade Commission has entered an order with which it alleges the respondent is not complying, but where the respondent has had no opportunity to present evidence that it is not violating the order, and where no proof had been taken before the Commission on that question. * * *

"The Commission alleges in its petition that its order is being violated, and the respect due by the courts to an independent agency of the government forbids the presumption that this allegation of the Commission is not made in good faith and based upon substantial grounds.
* * *

"The order of the Commission is not enforceable until affirmed by this court, and it would be a useless thing for the Commission to try the question of whether its order is being violated before affirmation of the order by this court.
* * *"

Petitioner here seeks comfort in the decision of *F.T.C. v. Morrissey*, 47 F.(2d) 101, 102 (C.C.A. 7, 1931) wherein an order of enforcement was granted upon application of the Commission under §5 of the Federal Trade Commission Act prior to amendment without any hearing as to the matter of violation. (Petitioner's Brief, pp. 15, 39). It is stated in the *Morrissey* case:

*"If nothing appeared in the proceedings to indicate that respondent had in some respect failed to comply with the Commission's order, we would feel compelled to follow the practice which we approved in Federal Trade Commission v. Standard Education Soc., 14 F.(2d) 947, 948, by first causing inquiry to be made as to whether respondent had failed to comply with the order. We there so held pursuant to the words of the statute, 'If such person * * * fails or neglects to obey such order of the commission * * * the commission may apply to the Circuit Court of Appeals,' etc.*

"But if from proceedings following the entry of the order it is fairly apparent that in some respect the order has not been obeyed, an affirming decree by the court will be justified. Respondents' answer fails in an important respect to assert compliance with the order. It asserts compliance only as to labels, placards, signs, and advertising, but not as to the use of the name of any such fruit as a part of a corporate or trade-name under which appellee transacted business, a practice which was specifically prohibited by the order."

To the same effect see *F.T.C. v. Wallace*, 75 F.(2d) 733, 735-6 (C.C.A. 8, 1935) wherein it is said:

"In his said answer respondent Wallace does not deny that the findings are supported by substantial evidence, nor the allegation in the commission's petition that he has failed and neglected to obey the cease and desist order.
* * *"

A reading of these cases indicates that, on the face of the pleadings in the proceedings following the issuance of the Commission's cease and desist order, the respondent was in violation of the order. Accordingly there was no need for an inquiry as to the fact of violation since this was established by the

admissions in the pleadings and the Seventh Circuit Court of Appeals expressly disavowed any intention of departing from the rule it had earlier announced in the *Standard Education Society* case.

In the instant case, by paragraph 6 of its answer, respondent has placed squarely in issue the fact of violation, and has affirmed that its conduct was at all times in compliance with the terms of the order of the Commission. There is nothing upon the face of "proceedings following the entry of the order" which would entitle this court to grant a decree of enforcement based on the rationale of the *Morrissey* case.

This survey of all of the decided cases upon the issue shows, therefore, a complete unanimity on the part of the courts which have considered the problem if not of rationale, at least of judgment and procedure. In each case, the courts have declined to enter an order of enforcement without first providing some method for a hearing upon the issue of the fact of violation. No case has been cited by petitioner nor revealed by our research in which an order of enforcement has been issued forthwith at the request of the Commission upon an allegation of violation by the Commission in the face of a denial of that fact by the respondent. And we do not understand petitioner to contend that its position finds support in a single decided case where the Commission has sought an order of enforcement in

the circuit courts.

4. The Legislative History of This and Other Statutes Dictates This Conclusion.

Petitioner states, in footnote 10, at page 32 of his brief, that:

"So far as we can find, nothing in the legislative history of the Clayton Act throws any light upon the question."

Respondent is content to accept this as an accurate statement, and to rely rather upon the language of the statute, its history in the courts, and the requirements of proper procedure as hereinafter set out.

There is nothing in petitioner's excerpts from legislative history of the provisions of the Federal Trade Commission Act which relates to the point at issue (Petitioner's Brief, pp. 30-35). The Conference Report statement that

"The findings of the Commission as to the facts are to be conclusive." (Petitioner's Brief, p. 31)

is only a restatement of the language of the statute relating to the function of the Commission in entering the original order.

The Statement of Senator Cummins (Petitioner's Brief, p. 31) is also simply a paraphrase of various provisions of the statute relating to the power of the court to affirm, reverse, or modify the factual

conclusions in the original proceeding which are conclusive if supported by testimony.

In short there is no legislative history as petitioner has stated which "throws any light upon the question." Petitioner urges that Congress included more explicit provisions in the Interstate Commerce Act, 49 U.S.C.A. §16(12), and the Packers and Stockyards Act, 7 U.S.C.A. §216, directing the court to determine upon hearing the fact of violation of the administrative order as a condition precedent to the entry of a decree of enforcement and thereby seeks to draw the conclusion that "proof of a violation of an order to cease and desist is not a condition precedent to the entry of a decree of enforcement under the Clayton Act" (Petitioner's Brief, pp. 29-30).

In each of these Acts, and in the Clayton Act, there are provisions for action by the appropriate administrative agency for "*enforcement*" of the order of the agency. In each case "*enforcement*" is the operative word to categorize the nature of the proceedings. Such proceedings must be sharply distinguished from proceedings by a party against whom the order has been entered to review and set aside the order (see *infra*. pp. 27-32). The Clayton Act provides that in such review proceedings the court has the power to affirm, modify or reverse the order of the Commission "as in the case of an application by the Commission for the enforcement of its or-

der," but this does not make the review proceeding of itself an enforcement proceeding.

As the Stockyards and Packers Act and the Interstate Commerce Act clearly demonstrate, when an administrative agency seeks enforcement of its order, it must first prove a violation thereof. These acts clearly establish this as a standard to be observed in the judicial enforcement of administrative action. This is precisely the requirement of the Clayton Act, and the very reason why the section pertaining to enforcement by the Commission commences with the words "If such person fails or neglects to obey the order of the Commission or board * * *". This is a short but equally effective way of saying what was said at greater length in the Stockyards and Interstate Commerce Acts; and is an expression of that same common denominator which underlies the enforcement provisions of all three Acts.

The excerpts from the Conference Report upon the National Labor Relations Act (Brief of Petition, p. 34) demonstrate that just such a phrase as introduces the enforcement procedure of the statute in question (15 U.S.C.A. §21)¹ was dropped from the National Labor Relations Act so that it might be clear that the issue of violation by the respondent was irrelevant. Surely this should indicate that

¹"If such a person fails and neglects to obey such order of the Commission while the same is in effect . . ."

where such language is in fact present, there was a converse intent that the issue of violation by the respondent must be met.

The very fact that the Federal Trade Commission Act, before its amendment in 1938 by the Wagner-Lea Act, 15 U.S.C.A. §45, contained provisions for the initiation of enforcement proceedings by the Commission, in substantially identical form to those of the Clayton Act (See pp. 9-10 *supra*) becomes all the more significant in view of the fact that these enforcement provisions were retained in the Clayton Act, 15 U.S.C.A. §21. It seems clear that the intent of Congress is plainly declared that while the issue of violation of the Commission's order is no longer of concern in proceedings for the enforcement of Commission orders under the Federal Trade Commission Act, since suit may be brought for substantial penalties at such time as the Commission's order becomes final (*supra* pp. 11-12), nevertheless the issue of violation is still the basic condition precedent to enforcement by the Commission through the processes of the Circuit Courts of orders issued under the Clayton Act.

Congress in enacting the Wagner-Lea Act, had before it the interpretation of the courts of the language in question in the *Balme*, *Standard Education Society* (Second Circuit), *Standard Education Society* (Seventh Circuit), *Morrissey* and *Baltimore Paint & Color Works* cases discussed above. These

decisions may have been instrumental in altering the provisions of 15 U.S.C.A. §45, and we may speculate upon the fact that concurrent enforcement of the Clayton Act is available through the Department of Justice perhaps accounted for the decision of Congress to leave the enforcement provisions of the Clayton Act unaltered. But in any event it is significant, in the light of these interpretations, that 15 U.S.C.A. §21 was not affected by the Wagner-Lea amendments and we suggest that the petitioner's recourse is not the tortuous construction of Section 11 of the Clayton Act here urged upon this court but, as suggested in *F.T.C. v. Standard Education Society*, 14 F.(2d) 947, 948 (C.C.A. 7, 1926), "is an argument that should be addressed to Congress rather than to this court."

5. *Decisions Involving Petitions for Review by Respondents Are Not Pertinent.*

As set forth above, *supra*, p. 8, petitions in this court to review or set aside Commission orders at the instance of respondents before the Commission, stand upon entirely separate and distinct statutory provisions (quoted above at p. 8) from the provisions relating to applications for enforcement at the instance of the Commission. And as pointed out above, although petitioner at the outset of its brief recognizes that "each is separate, distinct and independent of the other, seeking entirely different ac-

tion by, and asking entirely different affirmative relief from the court" (Petitioner's Brief, p. 13), we submit that the confusion in petitioners position is illustrated by its conclusions that "there is no valid reason for distinguishing between the conditions upon which an enforcement decree will be entered in the two types of proceedings" and "If the Commission is entitled to a decree of enforcement without proving a violation of its order in one instance, it is equally entitled to a decree of enforcement without the proof of a violation in the other" (Petitioner's Brief, p. 28).

Respondent recognizes that by the substantial weight of authority, where *a respondent* before the Commission has petitioned to review and set aside an order of the Commission pursuant to the statutory provisions set forth above at p. 8, the court may in such proceedings initiated by the respondent enter a decree affirming the Commission's order and *in the same proceeding* enter a decree of enforcement commanding the respondent to obey such order.

L. & C. Mayers Co., Inc., v. F.T.C., 97 F. (2d) 365 (C.C.A. 2, 1938) (Petition to review under 15 U.S.C.A. §45, prior to 1938 Amendments);

Oliver Brothers, Inc., v. F.T.C., 102 F. (2d) 763 (C.C.A. 4, 1939) (Petition to review and set aside under the Clayton Act);

Great A. & P. Tea Co. v. F.T.C., 106 F. (2d) 667 (C.C.A. 3, 1939) (Petition to review

and set aside under the Clayton Act);

Webb-Crawford v. F.T.C., 109 F.(2d) 268 (C.C.A. 5, 1940) (Petition to review under the Clayton Act);

Quality Bakers of America v. Federal Trade Commission, 114 F.(2d) 393 (C. C.A. 1, 1940) (Petition to review and set aside under the Clayton Act).

Petitioner refers (Petitioner's Brief, p. 27, note 5) to *Muller & Co. v. F.T.C.*, 142 F.(2d) 511, 520 (C.C.A. 6, 1944) which case it may be noted in passing, along with *Pep Boys, etc., v. F.T.C.*, 122 F.(2d) 158 (C.C.A. 3, 1941) and *Charles, etc., v. F.T.C.*, 143 F.(2d) 676 (C.C.A. 2, 1944), was based upon the amended provisions of the Federal Trade Commission Act (15 U.S.C.A. §45) which *specifically require the court as above noted (supra, p. 10) to* "issue its own order commanding obedience to the terms of such order of the Commission."

Petitioner also refers to *Biddle Purchasing Co. v. F.T.C.*, 96 F.(2d) 687 (C.C.A. 2, 1938) and certain unreported decisions (Petitioner's Brief, pp. 26-27) and suggests that contempt orders may issue upon decrees affirming Commission orders even though the reported opinion indicates that no decree of enforcement was entered. In the event no decree of enforcement as such is entered by the court (which by the weight of authority as above indicated may be done in proceedings to review and set aside initiated by the respondent), it would seem conceptu-

ally a bit difficult to ascertain of what a respondent might be adjudged in contempt; and from the reported opinions of this court in *Pacific States Paper Assn. v. F.T.C.*, 4 F.(2d) 457 (1925) and 88 F.(2d) 1009 (1937), no ready answer to this query would appear to be forthcoming.

The problems presented are well pointed up in the decision of the Seventh Circuit in *F.T.C. v. Fairyfoot Products Co.*, 94 F.(2d) 844, 845-6 (C.C.A. 7, 1938) where it is stated:

"In cause No. 5426, entitled Fairyfoot Products Company, a Corporation, Petitioner, v. Federal Trade Commission, Respondent, the petitioner sought a review of a 'cease and desist' order of the Federal Trade Commission. This court concluded that the 'cease and desist' order was a proper one and stated its decision in the following language: 'The order of the Commission is affirmed.'

"The Federal Trade Commission now files its petition praying that a rule issue against the Fairyfoot Products Company to show cause why it should not be adjudged in contempt for an alleged violation of the aforesaid order or decree.

"* * *

"The necessary conclusion from the decisions of this circuit and we believe from a proper construction of section 5, is that a general order of affirmance is not equivalent to a decree of enforcement; and that a decree of enforcement should be of the general nature and form of a decree of injunction, definitely fixing the duties of the party against whom the 'cease and desist' order has been issued.

"* * *

"We conclude that the entry of general affirmance by this court in cause No. 5426 was

not in legal effect an enforcement decree of this court embodying the prohibitions of the 'cease and desist' order of the Commission and enjoining the petitioner from violating the injunctive order of this court.

"The motion of the respondent herein, Fairy-foot Products Company, to dismiss the petition of the Federal Trade Commission for rule to show cause is sustained, and the petition is dismissed."

And by way of further clarifying the case references by petitioner, it should be pointed out that the reported opinion of this court in *Electro Thermal Co. v. F.T.C.*, 91 F.(2d) 477, 481 (1937) does not indicate that a decree of enforcement was entered by the court, it being held:

"It would seem, in view of the statute, that the Commission's informal prayer for affirmation of the Commission's order is properly here. It appears that the court is vested with plenary jurisdiction no matter which party brings the cause before it. The same language as to the court's jurisdiction is used in one case as in the other.

"The order of the Commission is affirmed."

On the contrary, the court's reference to "jurisdiction" appears clearly to refer to the power of the court to hear and consider the matter (*i.e.*, the validity of the cease and desist order) rather than to the power of the court to issue a decree of enforcement (Petitioner's Brief, p. 28).

In any event, as above stated, there appears to be no question but that *in a proceeding initiated by the respondent* to review or set aside a Commission or-

der under the pertinent provisions of Section 11 of the Clayton Act *a decree of enforcement as well as a decree of affirmance* may be entered by the Court of Appeals *in that proceeding*. As also set forth above *the issue of a violation is not involved in such proceedings and the statutory provision makes no reference to any violation of an order as a prerequisite for any judicial action or decree*.

But this proceeding before this court does not arise upon a petition to review initiated by this respondent. This proceeding is upon an application for enforcement sought by the Commission under an entirely separate and distinct statutory provision which very plainly and distinctly provides that "*if such person fails or neglects to obey such order of the Commission * * * the Commission * * * may apply to the Circuit Court of Appeals * * * for the enforcement of its order.*"

B. THE FACT OF VIOLATION MUST BE ESTABLISHED UPON HEARING IN AN ADVERSARY PROCEEDING

1. *Standards of the Administrative Procedure Act Require a Judicial Determination of This Issue.*

No more apt and succinct statement of petitioner's position may be found than at page 19 of its brief. There petitioner states:

"It therefore appears to us that the question whether a respondent has violated the Commission's order is not a judicial, but an admin-

istrative, question and one upon which the Commission's determination is conclusive."

Again at page 20, petitioner states:

"* * * Congress has left to the sole discretion of the Commission the question whether its action is reasonable and whether probable cause exists."

Petitioner assures the court that the Commission's procedures are careful and well-grounded, and that the Commission will under no circumstances abuse the discretion confided in it. However, parties appearing before the Commission or in actions brought before this court by the Commission, are entitled, in the determination of vital questions, not only to the assurance of the proper exercise of discretion by an administrative agency, but also to the safeguards of judicial review. Petitioner would make its own determination conclusive, not only upon the parties, but upon the courts. Petitioner suggests (Petitioner's Brief, p. 19) that the question of violation is analogous to the determination by the Commission in the first instance to issue a complaint, a determination which is to be resolved by an inquiry as to whether there is "reason to believe that any person is violating" the statute. The sophistry of this suggestion not only is manifest from the quoted language itself, but stands out in bold relief with a comparison of the purpose and objective of the two statutory provisions—one being a determination to initiate proceedings, a determination which in and of itself adjudicates nothing,

and the other a determination which serves as the condition precedent to subjecting a respondent to the rigors of contempt proceedings before this court.

The Federal Administrative Procedure Act, 5 U.S.C.A. §§1001-1011, Public Law 404, 79th Congress, 2d Sess. (1946), provides standards for judicial review applicable to the proceeding at the bar. The basic principle is stated in 5 U.S.C.A. §1009a:

“Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

This evinces a clear intent to broaden the scope of judicial review of administrative action. Admittedly, certain administrative procedures are precluded from judicial review, others have their own specified procedures. This section of the Act is important because it indicates the spirit in which the act is to be construed.

Title 5 U.S.C.A. §1009b relates directly to enforcement proceedings and provides:

“Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.”

The essence of this requirement is that there shall be review in such cases. If there is otherwise an adequate *and* exclusive remedy, the Administrative

Procedure Act is inoperative. If there is not such a remedy, that Act requires that one be furnished.

Title 5 U.S.C.A. §1009c requires that:

“Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.”

Again, judicial review is to be provided even if at present there is not an existing statutory remedy. Certainly petitioner claims that its action in determining that there has been a violation by respondent of its cease and desist order is a final action.

Respondent believes that the pertinent provisions of the Clayton Act, quoted above, specifically import a method of judicial review of the issue of violation. If this is not the case, however, then the Commission's final administrative determination of violation should be judicially reviewable under 5 U.S.C.A. §1009(c). For, failing this, respondent has no other “adequate remedy.”

Title 5 U.S.C.A. §1009(e) more particularly defines the scope of review. It states that the court shall

“(B) hold unlawful and set aside agency action, findings and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the

requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Were the action of the Commission in determining respondent to be in violation arbitrary or capricious, it could be set aside under this Act, and likewise if it were unsupported by substantial evidence or unwarranted by facts to the extent that the facts are subject to trial *de novo*.

It is respondent's contention that the procedure adopted by the Second, Fourth and Seventh Circuits in the cases cited, furnishes adequate safeguards, and in its essence, carries out the intent of the Administrative Procedure Act. In each case, the question of violation has been referred to a fact-finding body for report back to the court, rather than for final determination. Under such circumstances, it is believed that application of the Federal Administrative Procedure Act is not required.

If, however, the contention of petitioner is correct that the Clayton Act, as written, makes the determination of the Commission on the question of violation of the Commission's order final, then we submit there is presented a proper situation for the application of the remedies, standards and philos-

ophy of the Administrative Procedure Act.

2. *Appropriate Reference Should Be Made By This Court.*

From the foregoing we think this court must conclude that the question of violation of the Commission's order here involved, which has been placed in issue by respondent's answer (R. 59-60) to petitioner's application for enforcement, must necessarily be resolved by a judicial determination that such violation has in fact occurred before any decree of enforcement can be entered by this court. From the decisions discussed above (*supra*, pp. 15-23) it is apparent that in the majority of the cases where the Circuit Courts have been confronted with the problem, there has been a reference of the issue to the Federal Trade Commission for determination. *Federal Trade Commission v. Balme*, 23 F.(2d) 615; *Federal Trade Com'n. v. Baltimore Paint & Color Works*, 41 F.(2d) 474; *Federal Trade Commission v. Standard Education Soc.*, 86 F.(2d) 692; *Federal Trade Commission v. Herzog*, 150 F.(2d) 450. The reasons for such reference were succinctly stated by the court in the *Baltimore Paint & Color Works* case as follows:

"This court has no machinery for investigating or ascertaining the fact as to the compliance or noncompliance with an order of the Commission. The Commission has such machinery and is the proper body to pass upon that question.

"It is therefore the conclusion of the court that the order of the Federal Trade Commission, requiring the respondent, Baltimore Paint & Color Works, Inc., to cease and desist from certain practices found by the Commission to constitute unfair methods of competition, be, and the same is, affirmed. The question of the violation of the order, the enforcement of which is asked in the petition, is referred to the Federal Trade Commission, with opportunity for the respondent to answer and submit proof, and with direction to the Commission to report its conclusions to this court." (p. 476)

A comparable result has also been reached in *F.T.C. v. Standard Brands*, now pending in the Second Circuit (as discussed in Petitioner's Brief, p. 14, note 5) and *F.T.C. v. Inecto Inc.*, 70 F.(2d) 370 (C.C.A. 2, 1934) where apparently the Commission upon its own initiative has conducted adversary hearings on the question of violation of the Commission's order prior to filing the application for enforcement.

It is the petitioner's contention in this proceeding, however, that "the decree of this court therefore should be entered, as the statute provides, solely upon the record certified to the court by the Commission. There is no other record in existence and the Act does not contemplate any other record which might be certified to the court" (Petitioner's Brief, p. 25).

It would accordingly appear that the petitioner disavows any desire to hear this issue of violation on referral from this court. And since the decision

of this matter is necessarily one which must be made by this court, we suggest as the more appropriate procedure under the circumstances of this case, a referral of this issue to a referee or commissioner appointed by this court in accordance with the procedure established by the Seventh Circuit in *F.T.C. v. Standard Education Society*, 14 F.(2d) 947, 949 (C.C.A. 7, 1926) wherein it is held:

“* * *. It is further ordered that, unless the parties can within 20 days hereof agree upon a statement of facts respecting this issue of neglect, failure, or refusal of respondent to obey the order of the commission, either party may apply to the court for the appointment of a referee or commissioner to hear the testimony and report his findings upon this issue.”

VI.

CONCLUSION

In the light of the foregoing, respondent submits that there can be no decree of enforcement entered in this proceeding in the absence of a judicial determination that respondent has in fact violated the order of the Federal Trade Commission issued March 25, 1946. Respondent prays, therefore, that petitioner's application for enforcement be dismissed. In the alternative respondent requests that this court make reference of this proceeding to such person as it may deem appropriate for a hearing upon the issue as to whether or not respondent has in fact violated the Commission's order of March

25, 1946, and that such person be directed to report back its findings to this court for the determination by this court as to whether or not respondent has in fact violated such order.

Respectfully submitted,

BOGLE, BOGLE & GATES,

ROBERT W. GRAHAM,

J. KENNETH BRODY,

Attorneys for Respondents.

No. 12701

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

LEADBETTER LOGGING & LUMBER CO.,
Respondent.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board.



No. 12701

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
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Respondent.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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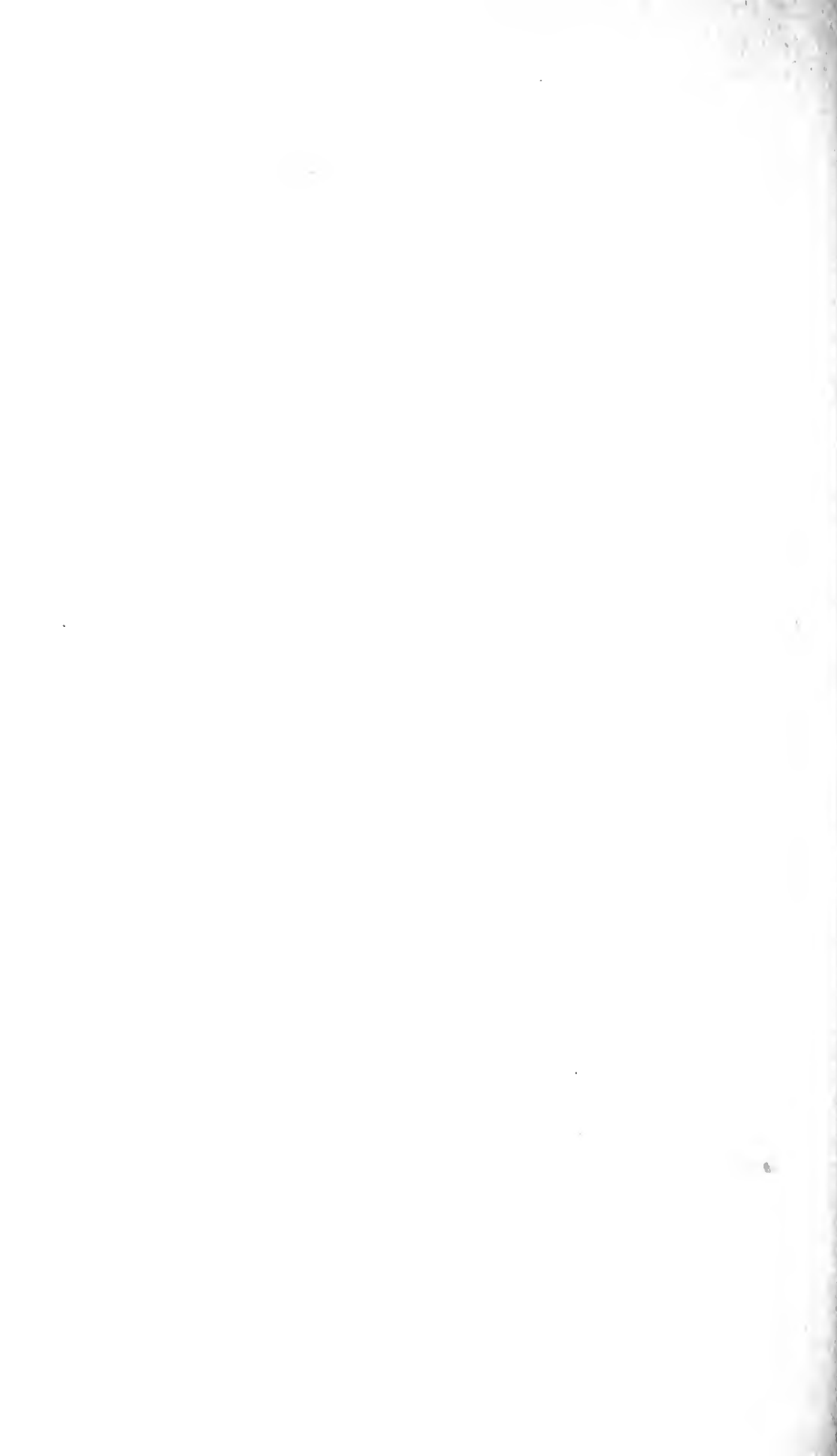
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GENERAL COUNSEL'S EXHIBIT NO. 1-D

United States of America
National Labor Relations Board

Budget Bureau No. 64-R00 1. 1
Approval Expires Nov. 30, 1949.

AMENDED CHARGE AGAINST EMPLOYER

Important—Read Carefully

Where a Charge Is Filed by a Labor Organization, or an Individual or Group Acting on its Behalf, a Complaint Based upon Such Charge Will not be Issued Unless the Charging Party and Any National or International Labor Organization of Which It Is an Affiliate or Constituent Unit Have Complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an Original and 4 Copies of This Charge with the NLRB Regional Director for the Region in Which the Alleged Unfair Labor Practice Occurred or is occurring.

Do Not Write in This Space

Case No.: 36-CA-47

Date Filed: April 26, 1949.

Compliance Status Checked by: 6/30/49 eb.

1. Employer Against Whom Charge is Brought

Name of Employer: Leadbetter Logging & Lumber Company.

Address of Establishment (Street and No., City.

Zone and State): 1405 S. W. Alder, Portland 5, Oregon.

No. of Workers Employed: 12.

Nature of Employer's Business: Dumping & Rafting Logs.

The Above-named Employer has Engaged in and is Engaging in Unfair Labor Practices within the Meaning of Section 8(a) Subsections (1) and (3) of the National Labor Relations Act, and these Unfair Labor Practices Are Unfair Labor Practices Affecting Commerce within the Meaning of the Act.

2. Basis of the Charge: Said employer on or about September 4, 1948, refused to hire Robert Cool for the sole reason that he is a member and active on behalf of the undersigned Union, in order to discourage membership in said union.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge: Local Union 11-81, International Woodworkers of America, CIO.

4. Address (Street and No., City, Zone, and State): Route 1, Oswego, Oregon.

Telephone No.: Oswego 2-4322.

5. Full Name of National or International Labor Organization of Which it is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization): International Woodworkers of America.

6. Address of National or International, if Any

(Street and No., City, Zone, and State): Governor Building, Portland, Oregon.

Telephone No. BR 5687.

7. Declaration

I Declare That I Have Read the Above Charge and That the Statements Therein Are True to the Best of my Knowledge and Belief.

By /s/ GEORGE WILLETT,

(Signature of Representative
or Person Filing Charge.)

Financial Secretary.

Date: Apr. 24, 1949.

Wilfully False Statements on this Charge can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80).

Received April 26, 1949, NLRB.

Received in evidence Oct. 18, 1949.

GENERAL COUNSEL'S EXHIBIT NO. 1-E

United States of America Before the National
Labor Relations Board, Nineteenth Region

Case No. 36-CA-47

In the Matter of

LEADBETTER LOGGING & LUMBER CO.,

and

INTERNATIONAL WOODWORKERS OF
AMERICA, LOCAL UNION 11-81, CIO.

COMPLAINT

It having been charged by International Woodworkers of America, Local Union 11-81, affiliated with the Congress of Industrial Organizations, that Leadbetter Logging & Lumber Co., has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 61 Stat. 136, hereinafter called the Act, the General Counsel of the National Labor Relations Board, on behalf of said Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 5, as amended, Section 203.15, hereby issues this Complaint and alleges as follows:

I.

Leadbetter Logging & Lumber Co., hereinafter called the Respondent, is a corporation duly organized and existing by virtue of the laws of the State of Oregon.

II.

The Respondent, in the course and conduct of its business, engages in logging and lumber operations in the State of Oregon. This Complaint involves the boom operation of the Respondent located at Oswego, Oregon.

III.

The Respondent, in the course and conduct of its business, annually sells lumber and lumber products valued in excess of \$100,000.00, of which more than 50% is shipped by the Respondent to points outside the State of Oregon.

IV.

International Woodworkers of America, Local Union 11-81, affiliated with the Congress of Industrial Organizations, hereinafter called the Union, is and at all times hereinafter mentioned has been a labor organization within the meaning of Section 2 (5) of the Act.

V.

On or about June 1, 1948, Robert Cool, a former boomman employed by Respondent at its Oswego, Oregon boom operation, made application to Respondent for employment as a boomman at Oswego, Oregon.

VI.

On or about June 1, 1948, and at all times thereafter, Robert Cool was available and willing to work for Respondent as a boomman at Oswego, Oregon, and such fact was known to Respondent.

VII.

On or about September 4, 1948, a position as boomman became available at the Oswego operation of Respondent, and Respondent, although knowing that Robert Cool was available and willing to accept such employment, did refuse employment to said Cool.

VIII.

Respondent refused employment to Robert Cool, as set out in the foregoing paragraph, and at all times thereafter refuses employment to said Cool because of his membership in and activities on behalf of said Union.

IX.

By the act described above in Paragraph VII and for the reason set forth above in Paragraph VIII, Respondent has discriminated and is discriminating, in regard to the hire and tenure of employment of Robert Cool, and has discouraged and is discouraging membership in the Union, and thereby has engaged in and is thereby engaging in an unfair labor practice within the meaning of Section 8(a) (3) of the Act.

X.

By the acts and conduct set forth above in Paragraphs VII to IX, inclusive, Respondent has interfered with, restrained and coerced its employees, and is interfering with, restraining and coercing them in the rights guaranteed them in Section 7 of the Act, and thereby has engaged in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

XI.

The acts and conduct of Respondent as set forth above in Paragraphs VII to X, inclusive, occurring in connection with the operations of the Respondent described in Paragraphs I, II and III, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States of the United States, and tend to lead to labor disputes which burden and obstruct the free flow of commerce.

XII.

The acts and conduct of the Respondent described above constitute unfair labor practices within the meaning of Section 8(a) (1) and (3) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director of the Nineteenth Region, on this 28th day of April, 1949, issues this Complaint against Leadbetter Logging & Lumber Co., Respondent herein.

[Seal]

.....,

Thomas P. Graham, Jr.,

Regional Director, Nineteenth Region National
Labor Relations Board, 515 Smith Tower,
Seattle 4, Washington.

Received in evidence Oct. 18, 1949.

GENERAL COUNSEL'S EXHIBIT NO. 1-H

United States of America Before the National
Labor Relations Board, Nineteenth Region

Case No. 36-CA-47

In the Matter of

LEADBETTER LOGGING & LUMBER CO.,

and

INTERNATIONAL WOODWORKERS OF
AMERICA, LOCAL UNION 11-81, CIO.

AMENDED NOTICE OF HEARING

Please Take Notice that on the 18th day of October, 1949, at ten o'clock in the forenoon, in the New Federal Court House, Portland, Oregon, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Amended Charge upon which the Complaint is based was previously served upon you.

You are further notified that, pursuant to section 203.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the

Complaint shall be deemed to be admitted to be true and may be so found by the Board.

In Witness Whereof the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Complaint and Notice of Hearing to be signed by the Regional Director for the Nineteenth Region on this 6th day of May, 1949.

[Seal]
Regional Director, National Labor Relations Board,
515 Smith Tower, Seattle 4, Washington.

Received in evidence Oct. 18, 1949.

GENERAL COUNSEL'S EXHIBIT NO 1-J

United States of America Before the National
Labor Relations Board, Nineteenth Region

Case No. 36-CA-47

In the Matter of

LEADBETTER LOGGING & LUMBER CO.,

and

INTERNATIONAL WOODWORKERS OF
AMERICA, LOCAL UNION 11-81, CIO.

ANSWER

Comes now Respondent Leadbetter Logging & Lumber Co., and for answer to the complaint denies, admits and alleges:

I.

Admits the allegations contained in paragraphs I, II, III and IV of the complaint.

II.

Admits the allegations contained in paragraph V of the complaint except that Respondent is without knowledge of the date Robert Cool made application for employment.

III.

Denies the allegations contained in paragraph VI of the complaint.

IV.

Admits the allegation contained in paragraph VII of the complaint except that Respondent denies that Robert Cool was available and willing to accept such employment.

V.

Denies the allegations contained in paragraph VIII of the complaint except that Respondent admits refusing employment to Robert Cool.

VI.

Denies the allegations contained in paragraph IX of the complaint and specifically denies that Respondent has discriminated or is discriminating in regard to the hire and tenure of employment of Robert Cool, has discouraged or is discouraging membership in the union, or has engaged or is engaging in unfair labor practices within the meaning of 8 (A) (3) of the Act.

VII.

Denies the allegations contained in paragraph X of the complaint and specifically denies that Respondent has interfered with, restrained or coerced its employees, is interfering with, restraining or coercing them in the rights guaranteed them in Section 7 of the Act, or has engaged in unfair labor practices within the meaning of 8 (A) (1).

VIII.

Denies the allegations contained in paragraph XI of the complaint and specifically denies that Respondent in any manner has done any acts which tend to lead to labor disputes which burden and obstruct the free flow of commerce.

IX.

Denies the allegations contained in paragraph XII of the complaint and specifically denies that Respondent has committed any acts which constitute unfair labor practices within the meaning of Section 8 (A) (1) and (3) and Section 2 (6) and (7).

X.

Respondent refused employment to Robert Cool in the boom operation at Oswego, Oregon, on or about September 4, 1948, for the following reasons only, namely, that during his previous period of employment with Respondent he was insubordinate, left his work without authority, refused to work or allow work to be done, interfered with the authority

of the foreman, and otherwise performed his duties in an unsatisfactory manner.

LEADBETTER LOGGING &
LUMBER CO.

By /s/ M. L. SULLIVAN,
Industrial Relations Manager.

State of Oregon,
County of Multnomah—ss.

I, M. L. Sullivan, being first duly sworn depose and say that I am the Industrial Relations Manager in the above-entitled proceedings; and that the foregoing Answer is true as I verily believe.

/s/ M. L. SULLIVAN.

Subscribed and sworn to before me this 6th day of May, 1949.

[Seal] /s/ H. STEWART TREMAINE,
Notary Public for Oregon.

My Commission expires February 26, 1952.

Received May 9, 1949, NLRB.

Received in evidence Oct. 18, 1949.

United States of America Before the National
Labor Relations Board, Division of Trial Ex-
aminers, Washington, D. C.

Case No. 36-CA-47

In the Matter of

LEADBETTER LOGGING & LUMBER CO.,

and

INTERNATIONAL WOODWORKERS OF
AMERICA, LOCAL UNION 11-81, CIO.

HUBERT J. MERRICK, ESQ.,

For the General Counsel.

KOERNER, YOUNG, SWETT & McCOLLOCH,
by

H. STEWART TREMAINE, ESQ.,

Of Portland, Ore.,

For the Respondent.

GEORGE & BABCOCK, by

WM. A. BABCOCK, ESQ.,

Of Portland, Ore.,

For the Union.

Before: Louis Plost,
Trial Examiner.

INTERMEDIATE REPORT

Statement of the Case

Upon an amended charge filed April 26, 1948, by International Woodworkers of America, Local Union 11-81, affiliated with the Congress of Industrial Organizations, herein called the Union, the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for the Nineteenth Region (Seattle, Washington), issued a complaint dated April 28, 1949, against Leadbetter Logging & Lumber Co., of Oswego, Oregon, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. On April 28, 1949, a copy of the complaint, together with a copy of the charge and a notice of hearing were served upon the Respondent and the Union. On October 21, 1948, the original charge had been filed and a copy thereof served on the Respondent by the Nineteenth Regional Office on November 1, 1948.

With respect to the unfair labor practices the complaint alleged in substance that the Respondent had refused and continues to refuse employment to one Robert Cool because of his membership in and activities on behalf of the Union, in violation of Section 8 (a) (1) and (3) of the Act.

On May 6, 1949, the Respondent filed an answer in which it admitted the jurisdiction of the Board, denied that it had engaged in any of the unfair

labor practices alleged in the complaint, and averred that it had refused employment to Robert Cool for cause.

Pursuant to notice a hearing was held at Portland, Oregon, on October 18 and 19, 1949, before Louis Plost, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, the Respondent, and the Union were represented by Counsel, who will hereinafter be referred to in the name of their respective principals. All the parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The parties were afforded the opportunity to argue orally on the record but waived the right. At the close of the hearing the undersigned granted without objection a motion by the General Counsel to conform all the pleadings to the proof with respect to the spelling of names, correction of dates, and like variances, not substantive. The undersigned set November 8, as the final date for all parties to file briefs, proposed findings of fact, and conclusions of law with the undersigned. Upon joint motion of the parties, made after the hearing, this date was extended to November 28, and again on joint motion to December 8, 1949.

A brief has been received from the Respondent. The Respondent likewise filed proposed findings of fact and conclusions of law.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The Business of the Respondent

The Respondent, Leadbetter Logging & Lumber Co., is an Oregon corporation which is a subsidiary of the Oregon Pulp and Paper Company which in turn is a subsidiary of the Columbia River Paper Company. The Respondent has a logging operation, a sash and door factory, a saw mill, and various reloading operations in Oregon as well as a boom operation at Oswego, Oregon, which is the only one of its various operations affected by this proceeding. A boom is an operation at which logs received by rail are unloaded and placed into a stream and made up into rafts for towing to their final destination. Although the word "boom" technically refers only to that part of the operation carried on in the stream, it is here used to include the entire operation both on shore and in the water. The Respondent's operation at Oswego is a "commercial boom," meaning that not only logs belonging to the Respondent are handled there but also logs of various shippers are handled for a fee. The Oswego boom handles annually an average of 60 million board feet of logs valued at \$40 per thousand board feet. Approximately 30 per cent of the logs handled by Respondent at its Oswego boom go to points outside the State of Oregon.

The Respondent concedes that it is engaged in commerce within the meaning of the Act.

II. The Organization Involved

International Woodworkers of America, Local Union 11-81, CIO, is a labor organization admitting employees of the Respondent to membership.

III. The Unfair Labor Practices

The Discriminatory Discharge of Robert Irwin Cool

The Respondent acquired the Oswego boom from the Reconstruction Finance Corporation sometime in February, 1947. At the time it took over the operation the Respondent kept the crew then employed. One of the crew members was Robert Irwin Cool who had been employed on the boom by its various operators since 1941. Cool had left the boom at some unspecified time but had been rehired in 1946 by Roy T. Hedrick, the foreman then in charge and now in charge of the operation. Cool continued to work at the boom until December 1947, when he voluntarily quit.

There is no dispute that Cool who has been employed in boom work for more than 18 years is entirely competent. Foreman Hedrick testified that Cool could perform any job on the operation with the possible exception of running the donkey engine. The Respondent's attorney volunteered the following statement on the record:

I would like the record to show that the Company is not making any contention that Mr. Cool was incompetent in the performance of his own functions as a boom man.

Foreman Hedrick testified that at the time Cool quit in December 1947, he decided to "refuse to hire Bob Cool" in the event Cool ever applied for reinstatement. Hedrick further testified that he did not communicate this decision to his superiors.

Sometime in June, 1948, according to Cool and either in July, August, or September, 1948, according to Hedrick, Cool asked Hedrick for employment and the latter told him there was no work available.

In September, 1948, Hedrick, requested the Union, which held a collective bargaining contract with the Respondent, if it could furnish a boom man for the Oswego operation. The Union replied that Cool was available whereupon Hedrick informed the Union that the Respondent would not employ Cool. Hedrick then hired an inexperienced man to fill the vacancy for which Cool had in fact applied and for which he had been offered by the Union upon the Respondent's request as to whether the Union could furnish a man for the Oswego operation.

The above findings are based on the mutually corroborative and credited testimony of witnesses called by both the General Counsel and the Respondent, including the testimony of Foreman Hedrick and Cool.

The Respondent's answer avers:

Respondent refused employment to Robert Cool in the boom operation at Oswego, Oregon, on or about September 4, 1948, for the following reasons only, namely, that during his previous period of employment with Respondent

he was insubordinate, left his work without authority, refused to work or allow work to be done, interfered with the authority of the foreman, and otherwise performed his duties in an unsatisfactory manner.

Hedrick's testimony was in accord with the Respondent's answer. In response to a question by the Respondent's attorney he testified that he refused to employ Cool,

For overstepping—insubordination and overstepping his authority as a job steward.

In February, 1947, Cool was elected job steward of the Oswego boom operation and as such he was charged by the Union with the presentation of grievances of the employees to the foreman (Hedrick).

In support of the Respondent's contention that Cool was insubordinate and incompetent Hedrick testified:

Q. On what occasions did you criticize his work as a boom man?

A. Well, I really don't know how to answer that. There was a direct refusal by him to take orders from me at one time. That was the main criticism I had of him.

Q. There was a direct refusal by him to take orders?

A. That is right.

Hedrick testified that on this occasion Cool was working on the raft, placing logs which were being floated down to form the raft. Hedrick went on the raft and told Cool to do the work in a different manner which Cool then refused to do and ordered

Hedrick to leave the raft. Hedrick left and later told the Union's business agent that he "didn't think that Mr. Cool had authority to put me off the raft." However, Hedrick did not file a formal grievance against Cool, report the matter to his superiors, or discharge or discipline Cool therefor.

Cool not only admitted the incident but elaborated on Hedrick's testimony. He described the manner in which the work was being done and testified that when Hedrick undertook to issue orders to him, Cool "let all holds go," thereby creating a "jam."

Hedrick and Cool were in agreement that this was the only time Hedrick directly criticized Cool's work during his entire employment at the Oswego boom operation.

Hedrick further testified that the incident above related occurred in January, 1947, before the Respondent acquired the Oswego boom.

The undersigned credits Hedrick's testimony as corroborated by Cool and finds that prior to the time the Respondent acquired the Oswego boom Cool refused to follow an order from Hedrick and ordered Hedrick off the raft on which Cool was at work, and further finds that this was the only occasion on which Hedrick directly criticized Cool's work, and that Hedrick took no disciplinary action against Cool at the time. However as the record is clear that the incident occurred prior to the time the Respondent acquired the Oswego boom and when the two men were not in the employ of the Respondent the undersigned fails to see how the incident can be consistently advanced as a reason

for the failure to hire Cool inasmuch as the Respondent's answer avers that Cool was refused employment for acts occurring during his previous period of employment with the Respondent and not as erroneously argued in the Respondent's brief "during his previous period of employment on the boom."

In support of its refusal to employ Cool because "during his previous period of employment with Respondent" Cool "refused to work or allow work to be done" the Respondent relies entirely on two incidents testified to by Hedrick. Both incidents occurred in July, 1947, some six months before Cool voluntarily quit. The first related to Cool's stopping the work on a skid or rollway, hereinafter referred to as the "skid incident," the second related to the moving of certain steel.

In the Respondent's Oswego operation logs are received by rail and unloaded from the cars which are placed on a spur track. The logs when removed from the cars are placed on timber skids and then rolled into the water where they are made up into rafts.

With respect to the skid incident Foreman Hedrick testified:

We had our boom work and our maintenance work, and our boom work and maintenance work are interchangeable. It is written in our contract that way. Well, one morning we had work to do on our rollway. At that time we were only able to put in twenty-one loads of

logs into our boom. The night before I had called the depot and had them set in twenty-one freight loads of one brand of logs, which means that you can go ahead and dump them. It took us 45 minutes exactly to dump those logs, and I took one man off the raft and used the two men that were on the hill, and they started to work on our rollway, and Cool came up and he told me that I was working out of turn on this rollway. I thought that he meant that I was working these same men too often. It was a dirty job, and it was dirty and dusty. And I told him at that time that I figured that as to the rest of the crew, as long as their job was finished below, I could have them come up and help us above. And he said, "By God"—I won't say "By God," because I never heard him say "God" in my life, but he says to this effect, "We are not going on that rollway. We have got too many logs to handle." And I said, "What are you going to do between now and 2 o'clock?" And he said, "We are not working the rollway." All right. And at that he hollered to the engineer to lower a skid that we had in the air—to lower her down. And I told the engineer to hold on to it, and he did. And I went in and called our company to find out what was what. That was after the Leadbetter Company had taken this over. And they told me to drop this skid back in. And the skid was put back in, and the whole 14 or 15 men went to the river, and they sat in the bunkhouse from

9:15 until 2 o'clock in the afternoon, before we got another log.

Cool at the time was job steward.

Ed Maher testified that Cool went to see Hedrick regarding the skid work at the direction of the raft crew.

Cool gave substantially the same account of the skid incident as did Hedrick, and further testified, being corroborated by Maher and LeRoy Saulsbury, that he was accompanied by another committee man. Both Hedrick and Cool agree that at least 21 cars of logs had been unloaded and 50 more were expected, however Cool testified that at the time there was an understanding between the Union and the Respondent that there should be no "bull cooking," meaning maintenance work, on days when 50 or more cars were to be handled. Hedrick admitted that such a policy was instituted because of the skid incident, but maintained that it was not in existence at the time, and further testified in effect that he did not consider the agreement binding as he did not personally make it.

There is no doubt that during the skid incident Cool was acting as job steward in behalf of the Union and on the direction of his fellow employees. The undersigned so finds and further finds on the preponderance of the evidence that Cool was accompanied by another committee member during his talk with Hedrick. It is also clear that Hedrick neither discharged nor disciplined Cool because of the skid incident, nor did he attempt to do so at the time.

With respect to the other occasion on which Cool is alleged to have "refused to work or allow work to be done" Hedrick testified:

And in this other instance, other than the roll-way, we had some steel or railroad iron to move, and I had taken two men to move it, and at that time, and the only time that Cool was ever accompanied by a committee man, he was accompanied at that time by a committee man—by one man.

Q. Will you tell us what that incident was?

A. I had two men working on that steel and Cool and this other man came up and started to saunter around—messaging around—and I walked over to them and told them that I expected them to do the work that was left down on the river to be done, and that these two men were going to pull up the steel and take care of it. And right away there was an argument started, and he says, "Well, if you are going to shoot off your big mouth, we just won't do it." So those two men still stayed there working, and this committee man and Cool went back. And I sent the men back off the job. I told them not to shove their necks out so that they would have any trouble with the Local. And that work was stopped at that time.

Cool did not deny Hedrick's testimony.

Ed Maher testified that at the time employees were called from the raft to move the steel "the men went into an awful long conversation about that

because it was not boom work and it was ruining their caulked shoes," and they instructed Cool "to stop it."

Caulked shoes are a type of safety shoe worn by men who work on floating timber. Maher testified that a pair of these shoes cost "around thirty bucks."

Hedrick further testified:

Q. (By Mr. Tremaine): Now, was this steel work part of the maintenance work done by the crew?

A. Well, I don't know. I really don't know whether it would be considered maintenance work or not. It was on Company property and they were working on Company time.

The undersigned credits the testimony of Hedrick, Cool, and Maher with respect to the incident regarding the moving of the steel as related above and finds that Cool was acting as job steward when he made the protest and that Hedrick knew this to be so. In crediting Hedrick the undersigned however, does not credit that portion of Hedrick's testimony to the effect that only at the time of the protest regarding the moving of the steel did Cool come accompanied by another employee or committee member.

Hedrick further testified that during the same general period as the above-related occurrence Cool on one occasion left the job for "an hour and a half"; that upon his return Cool told him first that it was "none of his damn business" where he had

been and then stated that he had been to see the Union's business agent; that following this explanation Cool then protested Hedrick's assignment of two men to move a private boathouse, as being work outside the Union contract and a violation of the State's insurance laws.

Hedrick admitted that while Cool has been absent he had put the men on this job which "was a separate job from that of the Leadbetter Company."

Cool did not deny leaving the job, and testified that he protested the work as being outside the Union's contract.

There is mutually corroborative testimony relating to one grievance meeting on the matter of seniority during which according to Cool's testimony he and Hedrick engaged in "quite a heated discussion." Both the protest regarding the moving of the boathouse and the seniority matter were within Cool's province as job steward. Hedrick did not discipline Cool for leaving the job without authority nor did he file a grievance with the Union because of it, although he had the right to do so.

Hedrick and Cool are in agreement that with the exception of the above-related occurrences there were no disputes, complaints, protests, grievances or any differences between the two men which were not caused by Hedrick's "pike pole pushing," meaning Hedrick voluntarily performing labor in the rafting of logs during the boom operation.

The contract between the Respondent and the Union prohibits performance of actual labor by the foreman and it is not disputed that Cool as job

steward was charged with the duty of enforcing this clause of the contract.

Hedrick admitted that he "pushed a pike pole" and that all job stewards previous to, following, and including Cool stopped him when they observed him working contrary to the contract.

He further testified that when he was stopped by the job steward the crew itself did not quit work because:

There was not too much of an argument on that because I knew that I was violating our contract, and I would argue with them a little bit, maybe, but it didn't do me a hell of a lot of good.

Cool testified that Hedrick's "pike pole pushing" was the cause of most of the grievances and that when he observed Hedrick so violating the contract,

Well, I would go up and I would simply tell him that I thought that he was violating the contract. Sometimes I would not go that far; I just would walk up the boom and he would see me coming, and he would lay the pole down and go up the hill.

Following Hedrick's refusal to employ Cool, the Union, in accordance with its contract, filed a formal grievance. At the final meeting on the grievance at which both Hedrick and Cool were present, the Union was represented by its district secretary, Garrison, its business agent, George Willett, and the job committee of the Respondent's employees. The Respondent was represented by Martin S. Sul-

livan, its industrial relations manager, and Walter J. Kerry, the supervisor of all its transportation including the Oswego boom operation. The Respondent admitted, however, that Hedrick was in direct charge of the Oswego boom under Kerry but argues in its brief that it was not shown that "any one in the Company other than Hedrick had any anti-union bias." The undersigned finds no merit in the argument and finds further that Hedrick bound the Respondent. Industrial Relations Manager Sullivan testified that he had never heard of Cool until the calling of this final grievance meeting; had not heard of the "pike pole" complaints until it was disclosed in the testimony at the instant hearing; had never heard of the skid incident nor the steel moving incident; and had never had any complaints regarding Cool or his work.

Kerry testified, that he had not heard of Cool's ordering Hedrick off the raft, but had heard of the skid incident and of the steel incident "just recently"; and further that he did not know that Cool had been refused employment until the grievance meeting on the refusal was arranged.

Employee Ed Maher testified:

I was at all three meetings, one with the foreman [Hedrick] and then with the superintendent, and then with the job committee.

Maher testified that at the initial meeting (with Hedrick alone) Hedrick "said that he [Cool] was an incompetent man" and also stated that Cool was a "trouble maker."

Maher further testified:

Q. Now what reason, if any, did he give at the subsequent meetings for not hiring Cool?

A. Well, he didn't come right out and give any exact reason, only that he said that either he or Bob . . . [Cool] well, that the two of them could not stay on the same job.

George Willett, the Union's business agent testified that he attended the final grievance meeting and that:

A. The result was that we went through the case again, and at that time we went into the competency of Mr. Cool a little more, and the foreman qualified his statement by stating that he thought that Cool was competent all right, but he would not do his work. And we took the position that he was entitled to the job, and the Company—Mr. Sullivan, that is, took the position that the Company would hire whoever they saw fit. And when we were not satisfied with the decision why he suggested that if we didn't like it we could file charges.

Hedrick testified that at the time he refused to employ Cool he gave no reason to the Union; that by "incompetent," he meant that although Cool could perform his work, he had not done so "on our particular job"; and admitted that at the grievance meeting he had stated "That either one of us had to step out of it . . . either one or the other."

There can be no doubt that the differences arising between Hedrick, the Respondent's direct representative on the Oswego operation and Cool were

bottomed on the latter's office of job steward for the Union. The possible exception would be Cool's action on the raft at the time Hedrick gave him an order which Cool refused to accept and then ordered Hedrick off the raft. However as this incident occurred before the Respondent acquired the Oswego boom. The undersigned is persuaded and finds that the "raft incident" did not enter into Cool's discharge.

Hedrick testified:

Q. (By Mr. Merrick): Well you do not have anything personal against Mr. Cool, do you? A. No.

Q. In other words, the troubles you have arise out of the job itself, did they not?

A. That is right.

Hedrick further testified:

Q. On any other occasion after that time [the "raft incident"] when you had a disagreement with him it was the result of some objection that he was making with respect to the practice that was being followed in the work, is that correct? A. That is right.

Q. And during all of that time he was the job steward?

A. Well, I don't know about the first time. At the time when he ordered me off the raft I do not think that he was job steward, but he was job steward when he stopped the work.

Q. And you knew that he was job steward?

A. I knew that he was job steward.

It is apparent that Cool took his duties as job steward quite seriously. Maher described Cool as "a very militant man as job steward, and he would give it and take it."

Hedrick testified that Cool "never met as a job steward should function" and that "he never presented a grievance before he stopped the operation." However, with the exception of the skid incident and the steel moving incident the record shows no stoppage of work by Cool's action unless it was the stopping of work by Hedrick when the latter was "pushing a pike pole" in violation of the Union's contract. Hedrick never sought to discipline or discharge Cool and his differences with Cool as well as Cool's very existence were unknown to the personnel manager directly over Hedrick.

That Hedrick expected Cool to promptly exercise his authority as job steward and that Hedrick resented this is apparent from the testimony of employee LeRoy Saulsbery who testified:

. . . One incident comes to mind. We were putting in a pipe up there that the bulldozer had broken. Mr. Hedrick asked me to go over and help him, and so I did. And he says, "I suppose Bob [Cool] will come up here now and try to stop us from doing this work. If he does, he is going to get fired, if he does not watch out."

Hedrick admitted making this statement.

On no occasion did Hedrick protest Cool's way of handling grievances to the Union as he had a

right to do. Apparently Cool always carried his point.

The Respondent's Proposed Findings of Fact and Proposed Conclusions of Law

The Respondent, together with his brief, filed Proposed Findings of Fact in which it proposed that the Trial Examiner find, (1) that the Union is a labor organization admitting to membership employees of the Respondent, and (2) made a recital of evidence and drew certain conclusions therefrom.

The undersigned accepts proposal I, and as to proposal II, the undersigned accepts so much thereof as is not inconsistent with the findings of fact and ultimate conclusions of this report otherwise the same is rejected.

The Respondent filed certain Conclusions of Law numbered 1 to 4, inclusive. The undersigned accepts proposal number 1 and rejects all others.

Concluding Findings on the Discharge of Robert Irwin Cool

The provision of Section 8(a) (3) of the Act which forbids discrimination in regard to hire includes the prohibition to refuse to hire an applicant because of union activity or affiliation, of course under proper circumstances an employer may decline to employ a union applicant but in the event that such refusal becomes the basis for a charge under the Act the test must be whether the applicant was rejected for reasons other than union membership or activity. This does not mean

that the burden is on the employer to disprove the charge, quite the contrary the burden is on the General Counsel. In the instant matter the undersigned is persuaded by all the evidence considered as a whole that the Respondent, through Hedrick, refused employment to Cool not because he was insubordinate, left his work without authority, refused to work or allow work to be done, interfered with the authority of the foreman, and otherwise performed his duties in an unsatisfactory manner during his previous period of employment with the Respondent, but that all the above-cited causes for Cool's discharge were not the real reason therefore but a mere pretext, the real reason being that Cool vigorously carried out his duties as job steward for the Union and sought to enforce those terms of the collective bargaining contract between the Respondent and the Union. The undersigned therefore finds that the Respondent refused employment to Robert Irwin Cool, on or about September 4, 1948, because of his membership in and activities on behalf of the Union in violation of Section 8 (a) (3) of the Act, and by so discriminating in regard to his hire and tenure of employment the Respondent has discouraged membership in a labor organization and interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, set forth in

Section III, above, occurring in connection with the operations of the Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has discriminated in regard to the hire and tenure of employment of Robert Irwin Cool by refusing him employment on or about September 4, 1948, it will be recommended that the Respondent, in order to effectuate the policies of the Act, offer him employment in the position to which he applied without prejudice to seniority or any other rights or privileges, and make him whole for any loss he may have suffered by reason of the Respondent's discrimination against him by payment to him of a sum of money equal to that which he would have earned from September 4, 1948, the date of the Respondent's refusal to employ him to the date of Respondent's offer of employment, less his net earnings during said period.¹

¹Crossett Lumber Co., 8 NLRB 440.

Upon the entire record, the undersigned infers and finds that the Respondent's illegal action, mentioned above, discloses an intent to defeat self-organization and its objects, and an attitude of opposition to the purposes of the Act. Because of the Respondent's unlawful conduct and the underlying purposes manifested thereby, the undersigned is convinced that the unfair labor practices found are persuasively related to the other unfair labor practices proscribed by the Act, and that danger of commission in the future of any or all of the unfair labor practices defined in the Act is to be anticipated from the Respondent's conduct in the past. The preventive purposes of the Act will be thwarted unless the recommendations are coextensive with the threat.² In order, therefore, to make effective the inter-dependent guarantees of Section 7, to prevent recurrence of unfair labor practices, and thereby minimize industrial strife which burdens and obstructs commerce, and thus effectuate the policies of the Act, the undersigned will recommend that the Respondent cease and desist, not only from the unfair labor practices herein found, but also from in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact.

²NLRB v. Express Publishing Co., 312 U. S. 426.

and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Leadbetter Logging & Lumber Co., Oswego, Oregon, is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. International Woodworkers of America, Local Union 11-81, CIO, is a labor organization, within the meaning of Section 2 (5) of the Act.

3. By discriminating with regard to the hire and tenure of employment of Robert Irwin Cool, thereby discouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that Lead-

better Logging & Lumber Co. (Oswego, Oregon), its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Woodworkers of America, Local Union 11-81, CIO, or any other labor organization of its employees, by refusing employment to any applicant because of such applicant's membership in and activities on behalf of a labor organization or by discriminating in any other manner in regard to hire and tenure of employment, or any term or condition of employment;

(b) In any other manner, interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Woodworkers Union of America, Local Union 11-81, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Robert Irwin Cool full employment in the position to which he applied and which the Respondent refused him on or about September 4, 1948.

(b) Make whole Robert Irwin Cool for any loss of wages he may have suffered by reason of the discrimination against him in the manner described in the section above entitled "The remedy";

(c) Post at its boom operation at Oswego, Oregon, copies of the notice attached hereto and marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region (Seattle, Washington), in writing within twenty (20) days from the date of receipt of this Intermediate Report what steps it has taken to comply therewith.

It is further recommended that unless on or before twenty (20) days from receipt of this Intermediate Report Respondent notifies the said Re-

gional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the aforesaid action.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the

Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 29th day of December, 1949.

/s/ LOUIS PLOST,
Trial Examiner.

Appendix A

Notice to All Employees Pursuant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Woodworkers of America, Local Union 11-81, CIO, or any other labor organization, to bargain collectively through representatives of

their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will Offer Robert Irwin Cool immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

Dated

LEADBETTER LOGGING &
LUMBER CO.,
(Employer)

By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service by Mail attached.

Return receipts attached.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT

Respondent, Leadbetter Logging and Lumber Co., takes exception to the Intermediate Report filed in the above case as follows:

1. To the action of the trial examiner in treating the case as one of claimed unlawful discharge rather than a refusal to hire. (Rep. p. 2, L. 59; p. 9, L. 33; p. 11, L. 2; p. 11, L. 19.)

2. To the action of the Examiner in applying to this case—a refusal to hire—the doctrine of condonation of offenses, which is applicable to discharge cases. (Rep. p. 10, L. 19-20; p. 10, L. 38-40.)

3. To the conclusion of the Examiner that an Union representative may not be refused employment. (Rep. p. 11, L. 21-27.)

4. To the refusal of the Examiner to give consideration to the mutual experiences of Hedrick and Cool while employed by one other than Re-

spondent. (Rep. p. 4, L. 45-61; p. 5, L. 1, 2; p. 9, L. 30-32.)

5. To the failure of the Examiner to find affirmatively that Respondent, at the times pertinent to the controversy, had no policy against Unions or organization, but had a policy of cooperation.

6. To the failure of the Examiner to find that Hedrick had no anti-union feeling or policy.

7. To the failure of the Examiner to find that Cool was insubordinate and would not accept the authority of his foreman. (Tr. p. 209.)

8. To the refusal of the Examiner to give consideration to the policy of Respondent to cooperate with the Union. (Tr. p. 265, 266.)

9. To all of Paragraph IV "The effect of the unfair labor practices upon commerce." (Rep. p. 11, L. 32-42.)

10. To the finding of the Examiner that the action of Respondent discouraged membership in a labor organization. (Rep. p. 11, L. 25-30.)

11. To the finding that Respondent violated Section 7 of the Act. (Rep. p. 11, L. 29, 30.)

12. To all of "Concluding Findings." (Rep. p. 11, L. 1-30) reading as follows:

"The provision of Section 8 (a) (3) of the Act which forbids discrimination in regard to hire includes the prohibition to refuse to hire an applicant because of Union activity or affiliation, of course under proper circumstances an employer

may decline to employ a union applicant but in the event that such refusal becomes the basis for a charge under the Act the test must be whether the applicant was rejected for reasons other than union membership or activity. This does not mean that the burden is on the employer to disprove the charge, quite the contrary the burden is on the General Counsel. In the instant matter the undersigned is persuaded by all the evidence considered as a whole that the Respondent, through Hedrick, refused employment to Cool not because he was insubordinate, left his work without authority, refused to work or allow work to be done, interfered with the authority of the foreman, and otherwise performed his duties in an unsatisfactory manner during his previous period of employment with the Respondent, but that all the above-cited causes for Cool's discharge were not the real reason therefore but a mere pretext, the real reason being that Cool vigorously carried out his duties as job steward for the Union and sought to enforce those terms of the collective bargaining contract between the Respondent and the Union. The undersigned therefore finds that the Respondent refused employment to Robert Irwin Cool, on or about September 4, 1948, because of his membership in and activities on behalf of the Union in violation of Section 8 (a) (3) of the Act, and by so discriminating in regard to his hire and tenure of employment the Respondent has discouraged membership in a labor organization and interfered with, restrained, and coerced

its employees in the exercise of rights guaranteed in Section 7 of the Act.”

13. To the first paragraph, page 12, L. 1-21 incl. reading as follows:

“Upon the entire record, the undersigned infers and finds that the Respondent’s illegal action, mentioned above, discloses an intent to defeat self-organization and its objects, and an attitude of opposition to the purposes of the Act. Because of the Respondent’s unlawful conduct and the underlying purposes manifested thereby, the undersigned is convinced that the unfair labor practices found are persuasively related to the other unfair labor practices proscribed by the Act, and that danger of commission in the future of any or all of the unfair labor practices defined in the Act is to be anticipated from the Respondent’s conduct in the past. The preventive purposes of the Act will be thwarted unless the recommendations are coextensive with the threat.² In order, therefore, to make effective the interdependent guarantees of Section 7 to prevent recurrence of unfair labor practices, and thereby minimize industrial strife which burdens and obstructs commerce, and thus effectuate the policies of the act, the undersigned will recommend that the Respondent cease and desist, not only from the unfair labor practices herein found, but also from in any other manner interfering with, restraining, or corescing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and take certain affirmative action designed to effectuate the policies of the Act.”

14. To Conclusion of Law 3. (Rep. p. 12, L. 36-41.)

15. To Conclusion of Law 4. (Rep. p. 12, L. 42-46.)

16. To Conclusion of Law 5. (Rep. 6. 12, L. 48-50.)

17. To all of numbered Paragraph IV. (Rep. p. 11.)

18. To all of numbered Paragraph V. (Rep. p. 11, 12.)

19. To the recommendation of the Examiner. (Rep. 1, 12, L. 54 to the end.)

20. The preponderance of the evidence does not support the Intermediate Report.

Respondent requests oral argument.

We submit the report should be reversed and the complaint dismissed.

Respectfully submitted,

H. STEWART TREMAINE,
Koerner, Young, Swett &
McColloch,
800 Pacific Building,
Portland 4, Oregon.

RICHARD R. MORRIS,
605 Park Building,
Portland 5, Oregon.

I, Richard R. Morris, one of the Attorneys for Respondent, do hereby certify that the foregoing is a full and true copy of the original.

/s/ RICHARD R. MORRIS.

Received January 31, 1950. N.L.R.B.

United States of America
Before the National Labor Relations Board

Case No. 36-CA-47

In the Matter of

LEADBETTER LOGGING & LUMBER CO.

and

INTERNATIONAL WOODWORKERS OF
AMERICA, LOCAL UNION 11-81, CIO.

DECISION AND ORDER

On December 29, 1949, Trial Examiner Louis Plost issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board¹ has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed, with the exceptions hereinafter noted. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and qualifications:

1. We find, in agreement with the Trial Examiner, that in violation of Section 8 (a) (1) and (3) of the Act, the Respondent refused employment to Robert Irwin Cool on or about September 4, 1948, because of his previous conduct in vigorously carrying out his duties as job steward for the Union and in seeking to enforce the terms of the collective bargaining agreement between the Union and the Respondent.²

¹Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this proceeding to a three-member panel.

²The Trial Examiner found that in January, 1947, an incident occurred in which Cool refused to follow an order of Foreman Hedrick and ordered Hedrick off the raft. We do not agree with the Examiner's conclusion that this incident could not be advanced as a reason for the Respondent's subsequent refusal to hire Cool because the incident occurred before the Respondent acquired the Oswego boom, and at a time when the two men were not in the Respondent's employ. We find, however, upon the basis of the entire record and particularly in view of Hedrick's failure to discipline Cool and the fact that

2. In the section of the Intermediate Report, entitled "The remedy," the Trial Examiner found that the Respondent's unlawful conduct "discloses an intent to defeat self-organization and its objectives and an attitude of opposition to the purposes of the Act." Accordingly, the Examiner recommended that the Respondent be ordered to cease and desist, not only from the unfair labor practices found, but also from in any other manner infringing upon the exercise of the employees rights guaranteed in Section 7 of the Act.

We are not persuaded, upon this record, that the Respondent has demonstrated a general intent to defeat self-organization and an attitude of opposition to the purposes of the Act. We are particularly mindful in this regard of the Respondent's past amicable relations with this and other unions³ and the fact that the Respondent has been dealing with the Union under a collective bargaining agreement. Under all the circumstances we believe that the policies of the Act will be adequately effectuated by ordering the Respondent to cease and desist from

this incident occurred almost a year before Cool voluntarily left the Respondent's employ, that the incident played no part in the Respondent's determination not to hire Cool in September, 1948.

The Trial Examiner's inadvertent reference at various points in the Intermediate Report to the discharge of Cool is hereby corrected to refer to the refusal to hire Cool.

³The Trial Examiner's rejection of the Respondent's offer of proof to this effect is hereby reversed.

the unfair labor practices found and from any like or related conduct.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Leadbetter Logging & Lumber Co., Oswego, Oregon, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Woodworkers of America, Local Union 11-81, CIO, or any other organization of its employees, by refusing employment to any applicant because of such applicant's membership in, and activities on behalf of, a labor organization, or by discriminating in any other manner in regard to hire and tenure of employment, or any term or condition of employment;

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Robert Irwin Cool immediate and full employment in the same or substantially equivalent position for which he applied and which the Respondent refused him on or

about September 4, 1948, without prejudice to any seniority or other rights and privileges;

(b) Make whole Robert Irwin Cool for any loss of wages he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of the discrimination against him to the date of the Respondent's offer of employment, less his net earnings during said period;

(c) Post at its boom operation at Oswego, Oregon, copies of the notice attached hereto and marked Appendix A.⁴ Copies of said notice to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region (Seattle, Washington) in writing, within ten (10) days from the date of

⁴In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be inserted before the words: "A Decision and Order," the words: "A Decree of the United States Court of Appeals Enforcing."

this Order, what steps the Respondent has taken to comply herewith.

Signed at Washington, D. C., this 19th day of April, 1950.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

PAUL L. STYLES,
Member.

[Seal] NATIONAL LABOR RELATIONS BOARD.

Appendix A

Notice to All Employees Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Woodworkers of America, or any other labor organization of our employees, by refusing employment to any applicant because of his membership in and activities on behalf of a labor organization, or by discriminating in any other manner in regard to hire and tenure of employment, or any term or condition of employment, except as required by an agreement requiring membership in a labor organization as a condition of employ-

ment as authorized in Section 8 (a) (3) of the Act;

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

We Will offer Robert Irwin Cool immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

LEADBETTER LOGGING &
LUMBER CO.,
(Employer)

Dated

By,
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service by Mail attached.

Return receipts attached.

[Title of Board and Cause.]

PETITION FOR RECONSIDERATION

Under date of April 19, 1950, a three member panel of the Board issued its decision and order in this proceeding. Paragraph 2(a) of the order reads, as follows:

Offer to Robert Irwin Cool immediate and full employment in the same or substantially equivalent position for which he applied and which the Respondent refused him on or about September 4, 1948, without prejudice to any seniority or other rights and privileges.

This provision of the order violates purposes of the Labor Management Act, and is in conflict with the principles promoted by that Statute. Its enforcement would defeat collective bargaining. The employees of Petitioner at the site herein involved are represented by Local Union 11-81, International Woodworkers of America, C.I.O., and have entered into a collective bargaining agreement. This agreement contains a seniority clause which affects the relative rights of the men with respect to lay-offs and re-hirings. Seniority rights are created by contract and are an appropriate subject matter for collective bargaining.

The order in Paragraph 2(a) purports to grant to Robert Irwin Cool super-seniority. It gives him a preferred status. It sets him above all other employees in that it fails to recognize that Cool's employment is subject to the seniority provisions in the collective bargaining agreement.

The order states that Cool shall be offered full employment "without prejudice to any seniority or other rights and privileges." It does not state that Cool's rights and privileges are also subject to the seniority rights and privileges of other employees.

While this petition for reconsideration is confined to this point, Petitioner does not waive the exceptions heretofore filed to the Intermediate Report of the Examiner.

Respectfully submitted,

/s/ H. STEWART TREMAINE,
KOERNER, YOUNG, SWETT
& McCOLLOCH,
800 Pacific Building,
Portland 4, Oregon.

/s/ RICHARD R. MORRIS,
605 Park Building,
Portland 5, Oregon.

Received May 2, 1950. N.L.R.B.

[Title of Board and Cause.]

ORDER CORRECTING DECISION AND ORDER

On April 19, 1950, the Board issued a Decision and Order in the above-entitled proceeding (89 NLRB No. 80). Thereafter, on May 2, 1950, the Employer filed a Petition for Reconsideration of

the aforesaid Order by modifying paragraph 2 (a) thereof. The Board having duly considered the matter,

It Is Hereby Ordered that the aforesaid Decision and Order be corrected by striking therefrom the words "without prejudice to any seniority or other rights and privileges," and substituting therefor the words "without prejudice to his seniority or other rights and privileges," in paragraph 2 (a) of the said Order inasmuch as it was the intent of the Board to insure the reinstatement of Robert Irwin Cool without prejudice to his seniority or other rights and privileges; and

It Is Further Ordered that the aforesaid Decision and Order of April 19, 1950, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., May 18, 1950.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

Affidavit of Service by Mail attached.

Return receipts attached.

Before the National Labor Relations Board
Nineteenth Region

Case No. 36-CA-47

In the Matter of:

LEADBETTER LOGGING & LUMBER CO.

and

INTERNATIONAL WOODWORKERS OF
AMERICA, LOCAL UNION 11-81, CIO

Tuesday, October 18, 1949

Pursuant to notice, the above-entitled matter came
on for hearing at 10:00 a.m.

Before: Louis Plost,
Trial Examiner.

Appearances:

HUBERT J. MERRICK,
515 Smith Tower,
Seattle, Washington,

Appearing as counsel for the General
Counsel, National Labor Relations
Board, Complainant.

WILLIAM A. BABCOCK, of
Messrs. George & Babcock,

600 Henry Building, Portland, Oregon,

Appearing on behalf of the Union, In-
ternational Woodworkers of Amer-
ica, Local Union 11-81, CIO.

H. STEWART TREMAINE, of

Messrs. Koerner, Young, Swett & McColloch,
800 Pacific Building,
Portland, Oregon,

Appearing on behalf of the Leadbetter
Logging & Lumber Co., Respondent.

PROCEEDINGS

Trial Examiner Plost: Are you gentlemen ready to proceed?

Mr. Tremaine: I am ready to proceed.

Mr. Merrick: Yes.

Mr. Babcock: Yes.

Trial Examiner Plost: The hearing will be in order. This is a formal hearing before the National Labor Relations Board in the matter of Leadbetter Logging & Lumber Company and International Woodworkers of America, Local Union 11-81, CIO, Case No. 36-CA-47.

The Trial Examiner conducting this hearing is Louis Plost.

Counsel will please state their appearances for the record. Who is appearing for the General Counsel?

Mr. Merrick: Appearing as counsel for the General Counsel is Hubert J. Merrick, whose last name is spelled M-e-r-r-i-c-k, and my address is 515 Smith Tower, Seattle.

Trial Examiner Plost: And who is appearing for the Respondent?

Mr. Tremaine: H. Stewart Tremaine, which is spelled T-r-e-m-a-i-n-e.

Trial Examiner Plost: And the name of the firm?

Mr. Tremaine: Koerner, Young, Swett & McCulloch.

Trial Examiner Plost: And the address?

Mr. Tremaine: 800 Pacific Building, Portland, Oregon. [3*]

Trial Examiner Plost: Who is representing the Union?

Mr. Babcock: George & Babcock, by William A. Babcock, 600 Henry Building, Portland, Oregon.

Trial Examiner Plost: Are there any other parties appearing? Let the record show no response. [4]

* * *

Mr. Merrick: If the Trial Examiner please, I would like to have this file marked for identification as General Counsel's Exhibit 1.

Trial Examiner Plost: It may be so marked.

(File above referred to marked General Counsel's Exhibit 1 for identification.)

Mr. Merrick: General Counsel's Exhibit 1 for identification consists of all the formal papers and pleadings which has been filed in the proceeding. They are numbered as follows: General Counsel's Exhibit 1-A is the original charge filed by the charging union;

1-B is the affidavit of service of the charge;

1-C is an affidavit of service of the amended charge;

1-D is the amended charge;

1-E is a copy of the complaint issued by the Regional Director of the Nineteenth Region of the National Labor Relations Board;

1-F is a notice of hearing in this matter;

1-G is the affidavit of service of the complaint, notice of hearing, and the amended charge;

1-H is an amended notice of hearing;

1-I is the affidavit of service of the amended notice of hearing;

1-J is the answer filed by the Respondent employer. [6]

Trial Examiner Plost: Mr. Tremaine, have you examined those documents?

Mr. Tremaine: I have.

Trial Examiner Plost: Is there any objection to their admission?

Mr. Tremaine: There is not.

Trial Examiner Plost: There being no objection the documents marked for identification by counsel for the General Counsel as 1-A to 1-J inclusive will be admitted in evidence.

(File above referred to, previously marked General Counsel's Exhibit 1 for identification, and containing General Counsel's Exhibits 1-A to 1-J inclusive, received in evidence.)

[General Council's Exhibits 1-D, 1-E, 1-H and 1-J are set out in this printed record on pages 1 to 12.]

Trial Examiner Plost: Do you gentlemen have any stipulations of any kind that you want to put into the record at this time?

Mr. Merrick: No, I do not believe that we do. [7]

* * *

Trial Examiner Plost: Before Mr. Sullivan takes the stand I notice in the complaint that it is admitted that the Union is a labor organization within the meaning of the Act. Is that correct?

Mr. Merrick: Yes.

Mr. Tremaine: Yes.

Trial Examiner Plost: And the commerce allegations are also admitted?

Mr. Tremaine: Yes.

Trial Examiner Plost: The commerce allegations do not have anything but one figure on commerce and that is, I presume, an arbitrary figure that the Company does more than 100 thousand dollars worth of business a year. Are all the parties satisfied that that is sufficient?

Mr. Tremaine: We are.

Mr. Merrick: I feel that the allegations of the complaint relative to commerce are quite scanty, so I wish to call Mr. Sullivan to fill those figures in. However, I do not think that there is any question about the jurisdiction of the Board.

Mr. Tremaine: No.

Mr. Merrick: I think that we might stipulate that the Leadbetter Logging & Lumber Company is engaged in commerce within the meaning of the Act. [8]

Trial Examiner Plost: The Respondent has admitted it, and the Board has taken jurisdiction of the company in other cases—I presume in R cases.

Mr. Tremaine: There is no objection on the part of the Company as to that.

* * *

MARTIN S. SULLIVAN

called as a witness on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Merrick:

Q. What is your name?

A. Martin S. Sullivan.

Q. What is your address, Mr. Sullivan?

A. 1405 Southwest Alder Street. That is the Company's address.

Q. That is your business address?

A. Yes, sir.

Q. That is Portland, Oregon? A. Yes, sir.

Q. What is your occupation? [9]

A. I am Industrial Relations Manager for the Leadbetter Logging & Lumber Company; Oregon Pulp & Paper; Columbia River Paper Mills, and other affiliated companies.

Q. How long have you held that position as Industrial Relations Manager?

A. With this corporation a little over two years.

Q. What are your duties as Industrial Relations Manager?

A. I look after all labor matters; make up agreements, and endeavor to settle differences.

Q. Now, the Leadbetter Logging & Lumber

(Testimony of Martin S. Sullivan.)

Company is an Oregon corporation, is that right?

A. Yes, sir.

Q. What is its corporate setup? What is the nature of its business?

A. The holding company is the Columbia River Paper Company. The Oregon Pulp & Paper Company is a subsidiary of the Columbia River Paper Company, and the Leadbetter Logging & Lumber Company is a subsidiary of the Oregon Pulp & Paper Company.

Q. Roughly, do you know how many corporations there are in this holding company—the Columbia River Paper Company?

A. I would say six or seven. I cannot just exactly state.

Q. Generally, what is the nature of the business as done by these corporations?

A. Principally in wood products. Logging, sawmill operations, woodworking plants, paper, and shingles. [10]

Q. In other words, they are engaged in practically all phases of lumbering and various products made out of lumber? A. Yes.

Q. What operations does the Leadbetter Logging & Lumber Company have besides its boom at Oswego, Oregon, which is the subject of this hearing?

A. The Leadbetter Logging & Lumber Company has a logging operation at Pedee, Oregon; we have the boom you referred to at Oswego; we have a sash and door factory at McMinnville; we have a sawmill

(Testimony of Martin S. Sullivan.)

at Kernville, which is dormant at the present time; we have a reload operation at Tillamook; we have a reload operation at Willamina, Oregon, which is dormant at the present time.

Q. All these operations are in the State of Oregon, are they not? A. Yes, sir.

Q. Are they all integrated? In other words, the logs that you have at your boom, do they come from your own logging operations?

A. Not necessarily. It is a commercial boom. They float from other operators besides ourselves.

Q. Well, do some of them come from your own source of supply? A. That is right. [11]

* * *

Q. Well, we will call Mr. Kerry as a witness on that. Regarding the Oswego boom, how are the logs supplied to that boom? Are they all supplied by rail? A. All logs come in there by rail.

Q. You have no other means of supplying logs there at Oswego? A. No. [12]

* * *

WALTER J. KERRY

called as a witness on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows: [13]

* * *

Direct Examination

By Mr. Merrick:

Q. Will you state your name?

A. Walter J. Kerry.

Q. And what is your address?

A. My business address?

Q. Yes, your business address.

A. 1405 Southwest Alder Street, Portland.

Q. What is your occupation?

A. I am supposed to be the coordinator of the transportation of logs.

Q. But what actually are you?

A. I handle the transportation of the booming and rafting, and reloading, and things of that kind.

Q. You supervise operations at the Oswego boom, do you? A. Yes.

Q. Are you generally familiar with the source of the logs [14] that go through the Oswego boom?

A. Generally, yes.

Q. Do you know, roughly, what percentage of the logs that go through your boom at Oswego come from your own logging operations?

A. At the present time none.

Q. None?

A. It is an old logging operation.

Q. At the present time you say none, but ordi-

(Testimony of Walter J. Kerry.)

narily do some of those logs come from the Leadbetter Logging & Lumber Company's source of supply?

A. Not actually from actual operation of the Leadbetter Logging & Lumber Company.

Q. Do you know, roughly, what the dollar value of the logs are that go through the boom at Oswego—what the yearly total would be?

A. That would vary considerably.

Q. In an average year what would it be?

A. I would estimate 60 million at \$40 per thousand average.

Trial Examiner Plost: That is 60 million feet?

The Witness: Yes.

Q. (By Mr. Merrick): At \$40 a thousand?

A. Yes.

Q. Now, at the boom at Oswego the logs are sorted and rafted, are they not? [15]

A. Yes, sir.

* * *

Q. (By Mr. Merrick): Now, of the total amount of the logs that go through the boom do you know, roughly, what percentage of those go outside of the State of Oregon?

A. At the present time possibly 30%.

Q. And that is 30% of the 60 million board feet?

A. Yes, sir.

Q. Which are valued roughly at \$40 a thousand?

A. Yes.

Trial Examiner Plost: Pardon me just a minute. For the record will you tell me what a boom is?

(Testimony of Walter J. Kerry.)

The Witness: The Oswego boom is a place where we unload logs from railroad cars, put the logs into the water, and then raft in boom sticks for towing to their destination. [16]

Trial Examiner Plost: Now, does the boom refer to specific machinery, or does it refer to a specific place?

The Witness: Ordinarily we refer to a boom as including everything, the unloading and all.

Trial Examiner Plost: The machinery and everything else that goes into it?

The Witness: Yes, sir.

Trial Examiner Plost: It is a plant, in other words, for taking logs and putting them into the water, and tying them into a raft, is that right?

The Witness: The actual boom itself, to be technical, is only that part in the water.

Trial Examiner Plost: Only that part which is in the water?

The Witness: Yes, but we always speak of the Oswego boom as including everything.

Trial Examiner Plost: As including the entire operation?

The Witness: Yes, sir. [17]

* * *

ROY T. HEDRICK

called as a witness on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Merrick:

Q. Will you state your name, please?

A. Roy T. Hedrick.

Q. And what is your address, Mr. Hedrick?

A. 455 Ninth Street, Oswego.

Q. Oswego, Oregon? A. That is right.

Q. How far is Oswego from Portland?

A. Oh, about seven miles I think from the city center.

Q. Is it on the Willamette River?

A. That is right.

Q. What is your occupation?

A. Foreman of the Oswego boom.

Q. What are your duties as foreman?

A. To direct the men in the unloading of logs.

Q. Do you also have charge of the sorting of logs and rafting of logs? A. Yes, sir.

Q. How long have you held this job as foreman?

A. Since 1944.

Q. Has the Leadbetter Logging & Lumber Company owned this boom since that time? [18]

A. They bought that boom since that time.

Q. Do you know when they bought the boom?

A. I think it was in April of 1947. I am not sure.

Q. When you first became foreman of the boom,

(Testimony of Roy T. Hedrick.)

who was the owner of the boom? A. The RFC.

Q. Had you been employed at this boom prior to 1944? A. Yes, sir.

Q. How long had you worked there?

A. Since about 1935.

Q. It has been under various owners since that time?

A. Well, two different owners, the RFC and Scott—Mr. Scott.

Q. Who owned it prior to the RFC, is that right?

A. Yes, he did.

* * *

Q. Generally what type of jobs have you held with this boom?

A. Well, I started as a rafter, and I was head rafter, and then I was foreman.

Q. When did you become head rafter?

A. Oh, about 1939 or 1940. I am not sure on that.

Q. The previous witness testified that all the logs were [19] supplied by rail at Oswego, is that right?

A. That is right.

Q. Compared with the other booms in the area, how does the Oswego boom compare in size?

A. Well, I would say that it was third in size.

Q. In other words, it is a fairly large boom?

A. That is right. It is a railroad boom, and they are all fairly large.

* * *

Q. What are the duties of the head rafter?

(Testimony of Roy T. Hedrick.)

A. The head rafter sees that the work is carried on on the raft itself.

Q. He supervises the actual rafting of the logs?

A. He supervises the actual rafting of the logs under me, yes sir. I direct him, and he directs the rafting of the logs. [20]

* * *

Q. And now, Mr. Hedrick, you are acquainted with Mr. Cool, the man about whom this hearing is being conducted? A. Yes, sir.

Q. When did you first have occasion to work with Mr. Cool?

A. That is a long time back. That was around 1940, or [22] something like that.

Q. At the present Oswego boom?

A. That is right.

Q. And you were the head rafter at that time?

A. Yes, sir.

* * *

Q. Was Cool working on that raft?

A. Yes, sir.

Q. At that time how did you find him as a workman? A. He was all right.

Q. Was he competent?

A. I thought so. Yes.

Q. Did he know his job as a boom man?

A. I think so.

Q. How did he get along with the other men in the crew?

A. I don't remember any time that he didn't get along with them at that time.

(Testimony of Roy T. Hedrick.)

Q. Well, if there had been any trouble you would have known about it, probably, wouldn't you? [23]

A. I probably would have known about it if I had remembered it.

Q. Did you ever have occasion to criticize his work at that time?

A. I don't believe that I did.

* * *

Q. Well, to your knowledge was his work criticized by the foreman in charge? A. No.

Q. In other words, he was a satisfactory employee when he worked on the boom in 1940?

A. To my knowledge he was.

Q. How long did he work on that occasion, do you recall? A. No, I do not.

Q. When did you next have occasion to work with Mr. Cool at the Oswego boom?

A. I was not working with him. He was working under me at that time, but I was not directly with him.

Q. When was that? A. In 1944.

Q. You were the foreman at that time?

A. Yes.

Q. Did you have occasion to hire him? [24]

A. Yes, sir.

Q. You were the one that actually hired him?

A. I am the one that recommended him. No, I didn't actually hire him. I recommended him for the job.

Q. You recommended him to Mr. Kerry?

(Testimony of Roy T. Hedrick.)

A. That is right.

Q. And following your recommendation he was hired? A. Yes, sir, that is right.

Trial Examiner Plost: Do I understand that some time between 1940 and 1944 Mr. Cool was not employed at this boom?

A. That is right. There was a period of time there when he was not there—a period elapsed there when he was not there.

Trial Examiner Plost: Can you give me the dates of that elapsed period when he was really out?

The Witness: No, I really cannot say. [25]

* * *

Q. Do you know how long he stayed?

A. Yes, sir.

Q. How long did he stay?

A. Thirteen months.

Q. Do you know when he left?

A. Yes, sir, I do.

Q. When did he leave?

A. It was some time in December.

Q. December of what year?

A. Well, he left in 1947, so that 1944 date is incorrect.

Q. Since he left in 1947 would you say that he came back in 1946? A. Yes, sir.

Q. That would be thirteen months prior to 1947, is that correct? A. Yes, sir.

Q. And you recommended him for the employment at that time? A. Yes, sir. [26]

* * *

(Testimony of Roy T. Hedrick.)

Q. (By Mr. Merrick): What was the job that Mr. Cool took when he came back in December of 1946? Is that when he came back? A. Yes.

Q. What was the job that he took when he came back in December of 1946?

A. He took a job as a boom man.

Q. Was that a permanent job or a temporary job? A. It was a temporary job at that time.

Q. Now, is it the practice to hire all workers on a temporary basis at this boom until you have an opportunity to observe their ability, or was he actually hired on a job which was temporary?

A. Yes, he was hired on a temporary job, during the time when there was a man off, and we hired him in his place. During that time there was a man quit, and Mr. Cool kept on.

Q. And he subsequently became a permanent employee, did he?

A. No, I would not say that any of them are permanent. There is a seniority list so that you have got to go right up when you start cutting our crew, and we cannot declare any job as permanent.

Q. Well, when this man quit he would be next in line, would he? A. Yes, sir.

Trial Examiner Plost: Would you say that after this employee quit and Mr. Cool took his place, that he was as permanent as any of the men on that job?

The Witness: No. Even then he would be the first man that we would have to lay off in an elapsed period.

(Testimony of Roy T. Hedrick.)

Trial Examiner Plost: But considering his seniority, was he permanent as far as seniority was concerned? By that I mean if you had hired a man after Cool——

The Witness: (Interposing) Yes.

Trial Examiner Plost: (Continuing) ——would Cool be permanent as far as the last man was concerned who had been hired?

The Witness: Yes, sir.

Q. (By Mr. Merrick): Now, will you testify what work Cool was doing during that time?

A. He was a boom man.

* * *

Q. That was the same type of work that he had performed in 1940? A. Yes, sir.

Trial Examiner Plost: Tell me what a boom man does. [28]

The Witness: A boom man works under the head rafter, rafting logs, doing maintenance work, or any work connected with the boom at all that he is asked to do.

Trial Examiner Plost: And could he run one of these boats?

The Witness: He could be broken in on one of the boats.

Trial Examiner Plost: So his job was that if you wanted him to run one of those boats he could be put on one of those boats?

The Witness: No.

Trial Examiner Plost: Or he could object to it?

(Testimony of Roy T. Hedrick.)

The Witness: He could object to it, and if he had reason, why we would accept his objections. We never try to force anybody to do anything.

Trial Examiner Plost: But if you wanted him to work on a boat, he could work on a boat?

The Witness: That is right. That is, if they wanted him to, and if he wanted to. That would be just between the operation and himself.

Trial Examiner Plost: Now, when you say that he worked as boom man and you described his work, does that mean that he went down in the water and moved these logs around? Was that part of his job? Not in the water, but on the log?

The Witness: Yes.

Trial Examiner Plost: He worked with a pike pole, in other words? [29]

The Witness: Yes, sir.

Trial Examiner Plost: And was part of his job to see that the logs came down from the railroad cars?

The Witness: Yes, sir; that is right.

Trial Examiner Plost: Was that a part of his job?

The Witness: Yes. Those jobs are interchangeable.

Trial Examiner Plost: And he could be put on any of these jobs that you wanted to put him on?

The Witness: Yes, sir.

* * *

Q. (By Mr. Merrick): Along the same line of questioning, in your opinion was Mr. Cool capable

(Testimony of Roy T. Hedrick.)

Trial Examiner Plost: But considering his seniority, was he permanent as far as seniority was concerned? By that I mean if you had hired a man after Cool——

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The Witness: Yes. Those jobs are interchangeable.

Trial Examiner Plost: And he could be put on any of these jobs that you wanted to put him on?

The Witness: Yes, sir.

* * *

Q. (By Mr. Merrick): Along the same line of questioning, in your opinion was Mr. Cool capable

(Testimony of Roy T. Hedrick.)

of performing all the work or jobs on the boom?

A. No.

Q. Which jobs was he not capable of performing?

A. I don't think that he could run the unloader.

* * *

Q. But he was capable of performing the work of a boom man for which he had been hired?

A. Yes, sir, that is right.

Q. Is that a particularly hazardous job?

A. Well, some people say it is. I have worked at it since 1918, and I am still here. [30]

* * *

Q. During the time that Mr. Cool was employed there, the last time, do you know what particular union job he had—while on the operation of the boom?

A. He was job steward.

* * *

Q. Do you know whom he succeeded as job steward?

A. Ed Maher. I am quite sure of that.

* * *

Q. Now, this last tour of duty that Mr. Cool had in connection with the boom out there, did you ever have occasion to criticize his work as a boom man?

A. Yes. [31]

* * *

Q. On what occasions did you criticize his work as a boom man?

(Testimony of Roy T. Hedrick.)

A. Well, I really don't know how to answer that. There was a direct refusal by him to take orders from me at one time. That was the main criticism that I had of him.

Q. There was a direct refusal by him to take orders?
A. That is right.

* * *

Q. That occurred on one occasion, did it?

A. That was about the only time that I tried to direct him.

Q. Well, was he doing his work in a particularly incompetent manner at that time?

A. That is right; I thought that he was.

Q. What was the nature of the work that he was doing at the time?

A. He was rafting logs.

* * *

Q. Well, what action did you take on it?

A. I didn't take any. I asked him to do the work the way that [32] I wanted it done, and he refused to do it.

Q. And that is as far as you went with it?

A. Yes, it is. I was ordered off the raft, and I went off.

* * *

Trial Examiner Ploust: Now, you say that you were ordered off the raft at that time. Who ordered you off the raft?

The Witness: Mr. Cool. He told me that I had no business on the raft.

(Testimony of Roy T. Hedrick.)

Trial Examiner Plost: And he was merely working on the raft at that time?

The Witness: That is right.

Trial Examiner Plost: And you left the raft, did you?

The Witness: I left the raft, yes.

* * *

Q. Well, you testified that he was rafting logs in an improper [33] manner. Was there any other occasion that you had to criticize his work?

A. No, there was never any time that I tried to criticize it at all.

* * *

Trial Examiner Plost: Pardon me a moment, Mr. Merrick. Before we get lost here, for my sake, reference has been made here that Mr. Cool was a job steward. Was the Company and the Union, of which Mr. Cool was the job steward at the time, under contract at that time?

The Witness: I think there was no signed contract. That is, the RFC could not sign a contract.

Trial Examiner Plost: Oh, this was under the RFC?

The Witness: That is right, and we were working then according to our old contract.

Trial Examiner Plost: Did you recognize the Union at that time?

The Witness: Yes, we did.

Trial Examiner Plost: The Union was recognized?

The Witness: Yes, sir.

Trial Examiner Plost: And the job steward had

(Testimony of Roy T. Hedrick.)

certain rights and certain duties that were recognized by the Company?

The Witness: Yes, sir.

Trial Examiner Plost: Or the RFC at that time, rather? [34]

The Witness: Yes, sir.

* * *

Q. (By Mr. Merrick): Now, the only specific example that you can recall of this incompetence was this one occasion when you told him that he was not rafting logs in the proper manner?

A. That is the only one that I can think of—yes.

* * *

Trial Examiner Plost: Let us go back on the record.

Q. (By Mr. Merrick): During the last time that Mr. Cool was with you, from December 1946 to December, 1947, did you ever find him causing any trouble with members of the crew?

A. Yes.

Q. Can you give us some specific instances in which he caused trouble among the crew?

A. Yes, I can. At the time that he ordered me off the raft, he told me then that the crew would take orders from our head rafter. [35]

Q. Wait a minute. I am referring to causing trouble among the crew. A. It did.

Q. Did that cause trouble among the crew?

A. That did.

Q. How do you know that it did?

(Testimony of Roy T. Hedrick.)

A. Because part of the crew came to me and there was the head rafter with them.

Q. Well——

A. (Interposing) Oh, let me finish my story, please. Do you want me to?

Q. No. I will ask the questions and you answer them. A. Thank you.

Q. Now, you say that he caused trouble on this occasion when he ordered you off the raft among the crew. Is that correct?

A. No, I didn't say that.

Q. Well, was there any trouble among the crew over this?

A. That led up to trouble—yes.

Q. How did that lead up to trouble?

A. I cannot tell you unless I go on with my story.

Q. All right. Continue on with your story.

A. He told me that the crew would take orders from our head rafter and for me to give the orders through the head rafter, and they would take them following that, and I did that, but it was not a month until Mr. Cool came to me and said that the [36] crew was refusing to take orders from the head rafter, and that the head rafter was throwing his voice around too much, and I told him that I would let the head rafter do as he wanted to do.

* * *

Q. That was the grievance, wasn't it—that is, the Company had a grievance that he exceeded his

(Testimony of Roy T. Hedrick.)

authority as a job steward? A. That is right.

Q. Was anything done about that?

A. No, sir.

Q. Was any protest made to the Union Business Agent? A. Yes, sir. I made one myself.

* * *

Q. What was the nature of the conversation in that respect?

A. I just told him that I didn't think that Mr. Cool had authority to put me off the raft.

Q. And what did he say about that?

A. He didn't say anything about it at all. He just grinned at me and he said that he would talk to him, or something. [37]

* * *

Q. Now, on what other occasions did he cause trouble with the boom crew?

* * *

A. Well, there was one fellow that quit the boom on account of him.

* * *

Q. Now, do you have any other specific examples where he [38] caused trouble?

A. Yes. One time he stopped their job. It was written in our contract—well, maybe I had better not tell that story now.

Q. Well, did that arise out of his duties as a job steward?

A. He was job steward at the time, yes.

(Testimony of Roy T. Hedrick.)

Q. And he came to you as a job steward?

A. Yes, sir.

Mr. Tremaine: I do not think that his answer was quite addressed to the question. Your question was, did that arise out of the duties as job steward? And his answer was that he was job steward at the time. Now, I want to make it clear. Was your answer, "Yes," to his question?

The Witness: No.

Q. (By Mr. Merrick): What instance is this that you are referring to?

* * *

A. We had our boom work and our maintenance work, and our boom work and maintenance work are interchangeable. It is written in our contract that way. Well, one morning we had work to do on our rollway. At that time we were only able to put in twenty-one loads of logs into our boom. The night before I had called the depot and had them set in twenty-one freight loads of one brand of logs, which means that you can go ahead [39] and dump them. It took up 45 minutes exactly to dump those logs, and I took one man off the raft and used the two men that were on the hill, and they started to work on our rollway, and Cool came up and he told me that I was working out of turn on this rollway. I thought that he meant that I was working these same men too often. It was a dirty job, and it was dirty and dusty. And I told him at that time that I figured that as to the rest of the

(Testimony of Roy T. Hedrick.)

crew, as long as their job was finished below, I could have them come up and help us up above. And he said, "By God"—I won't say "By God," because I never heard him say "God" in my life, but he says to this effect, "We are not going on that rollway. We have got too many logs to handle." And I said, "What are you going to do between now and 2 o'clock?" And he said, "We are not working the rollway." All right. And at that he hollered to the engineer to lower a skid that we had in the air—to lower her down. And I told the engineer to hold on to it, and he did. And I went in and called our company to find out what was what. That was after the Leadbetter Company had taken this over. And they told me to drop this skid back in. And the skid was put back in, and the whole 14 or 15 men went to the river, and they sat in the bunkhouse from 9:15 until 2 o'clock in the afternoon, before we got another log.

Trial Examiner Plost: And at that time Mr. Cool was the job steward? [40]

The Witness: Yes sir.

Trial Examiner Plost: Representing the Union?

The Witness: Yes sir.

Q. (By Mr. Merrick): Now, Mr. Hedrick, this trouble was between Cool and yourself, is that right—this incident of the skid? It was not between Cool and individual employees on the boom. It was between yourself and Mr. Cool, is that right?

A. Well, the argument was, sure. I argued that they should do the work.

(Testimony of Roy T. Hedrick.)

Q. And Mr. Cool came to you as job steward and said that they should not do the work, is that correct?

A. He came to me—I do not know as you would class that as a job steward.

Q. Do you know who was with him on that occasion?

A. No one was with him.

Q. What is that?

A. No one was with him.

Q. You are certain that no one was with him?

A. I am certain that no one was with him.

Q. Now, how many cars did you say that you had unloaded that day?

A. We had unloaded 21.

Q. And how many more did you have to do on that day?

A. Well, I don't know. Probably 50.

Q. What is the average number of loads per day out there? [41]

A. Oh, if you take an average—we averaged about 35 this year, I think.

Q. Well, did you ever have an agreement out there as to how many loads the men would put in the water each day?

A. No. There was a verbal agreement after this incident.

Q. What was the verbal agreement?

A. That they would unload—I have forgotten now how many, and if we had anything over that, why we guaranteed that there would be no maintenance work done.

Q. In other words, according to this verbal

(Testimony of Roy T. Hedrick.)

agreement if so many loads were put into the water on that particular day, then there was no more maintenance work on that day, or no more maintenance work period, is that right?

A. I never made any agreement like that.

Q. Was that the nature of the agreement that you had?

A. No, it was not, because there is maintenance work that has to go on. [42]

* * *

Q. This verbal agreement that you referred to, just how many loads were named in this agreement?

A. I don't remember.

Trial Examiner Plost: Now, this verbal agreement you are talking about you say was made after this incident when Mr. Cool stopped the job that you are talking about?

The Witness: That was made by the job committee, or by one of the job committee men and one of the men that are over me, and it was agreed in that agreement—

Trial Examiner Plost: (Interposing) I do not care about the agreement. But am I to understand that there was no such agreement in effect as the time that Mr. Cool stopped the job?

The Witness: Absolutely not.

* * *

Q. (By Mr. Merrick): When Mr. Cool came to you with this complaint about this skid work, didn't he mention this agreement? A. No.

(Testimony of Roy T. Hedrick.)

Q. Well, didn't he take the position that the men had too many loads to handle?

A. That is right.

Q. He took the position that they were not to do maintenance work that day because they had too many loads to handle, is [43] that right?

A. That is right.

Q. Now, in the time that you say that you worked at this boom, since 1940, hasn't that practice been followed since that time?

A. What practice?

Q. The practice of limiting the maintenance work when there were so many loads to get out in a day.

A. Absolutely not. Not since 1935 I will say.

Q. And in all that period there was no practice of not doing maintenance work on any day when you had a great deal of production work?

Q. Strike that, Mr. Reporter. Don't you do your maintenance work on off days, when you have comparatively light loads?

A. That is right. We give our crew all the breaks that we can give to them, and I gave it to them on this occasion too.

Q. And that had been the practice since 1935 that you know of?

A. It has been the practice since 1935 to do that work when asked to do it.

Q. And you say that on this day that you had this beef with Mr. Cool, you had already put in 21

(Testimony of Roy T. Hedrick.)

loads, and you had probably 50 more loads coming that afternoon? A. That is right.

Q. Hasn't it been the practice in the past, when the men have [44] had a heavy load in the morning and have some logs coming in in the morning, that they wait around until the logs come?

A. Not at that time.

Q. Has it been the practice since that date?

A. Yes, it has. We have made it a practice.

Q. It has been the practice since that time?

A. Yes sir.

* * *

Q. How often did Mr. Cool bring grievances to you as job steward? A. He did not.

Q. He did not? A. No.

Q. Well, wasn't he the job steward?

A. He was the job steward. He never met as a job steward should function. We were supposed to have a committee according to our agreement, and there never was a time when he asked for a [45] committee meeting.

Q. They have to have a committee meeting?

A. They are supposed to according to our contract—yes. [46]

* * *

Q. (By Mr. Merrick): Well, you do not have anything personally against Mr. Cool, do you?

A. No.

Q. In other words, the troubles that you have arose out of the job itself, did they not?

A. That is right. [47]

(Testimony of Roy T. Hedrick.)

Q. Now, what caused most of the trouble if it didn't arise from this situation of job steward?

A. It was the attitude that he had on the job.

* * *

Q. (By Mr. Merrick): When did you have clashes with him that did not arise out of his job as job steward?

A. On one other occasion, when he left the job, walked off the job, and didn't say anything. He walked off the job and was gone for an hour and a half, and none of the crew knew where he was, and when he came back I asked him where he had been, and he as much as told me that it none of my damn business. He told me that he was up to George's, and then I told him that he would have to have permission after that if he wanted to leave the job, and he told me, "Don't you take any of these men after this and work them on any other job."

Q. You say that he said that he was up to George's?

A. Yes, sir.

Q. That was up to what George.

A. George Willett.

Q. That is the Business Agent? [48]

A. Yes sir.

Q. He was up there on business matters, was he?

A. I don't know what he was up there for.

Q. Well, you knew that he went up there, didn't you?

A. Yes sir.

Q. Now, you say that he stated not to take any of the men off the crew when he came back?

(Testimony of Roy T. Hedrick.)

A. That is right, not to take them off and work them on any other job.

Q. What was he referring to?

A. I had taken two men off to move a boathouse or a boat.

Q. And for whom was that, whose boat was that?

A. Dr. Kratley's, and dentist here in town.

Q. That was a separate job, a job altogether separate from that of the Leadbetter Company?

A. That is right. It was a separate job from that of the Leadbetter Company, and each man got \$5 for moving that boat.

Q. According to the contract they were not to do any other work, were they?

A. They were not, and they didn't, but in this case they were asked to do that on a voluntary basis, and they voluntarily did that. [49]

* * *

Q. (By Mr. Merrick): Anyway the complaint of Mr. Cool on that occasion was taking two men to work on a private job for a private individual off of their work at the boom? A. No.

* * *

Q. They were working for Kratley, weren't they? A. Yes sir.

Q. And he protested that? A. Yes sir. [50]

* * *

Q. (By Mr. Merrick): How often did you have run-ins with Mr. Cool regarding your pushing with a pike pole?

(Testimony of Roy T. Hedrick.)

A. I think once. Maybe more, I don't know.

Q. It was his position that that was a violation of the contract?

A. Yes sir.

Q. And it is a violation of the contract, isn't it?

A. Yes sir.

Trial Examiner Plost: By that expression am I to understand that you were working with a pike pole yourself?

The Witness: Yes. [51]

* * *

Q. Now, in presenting these grievances on your pushing the pike pole, was Mr. Cool always the spokesman for the grievance committee?

A. No. I think that the job steward prior to him—well, I am not sure about that now.

Q. Well, the job steward prior to him had also protested your use of the pike pole, hadn't he?

A. That is right, yes.

Q. And when Mr. Cool was there as job steward he was always spokesman, isn't that right?

A. Yes sir.

Q. And he was the one who always gave you hell for it?

A. No. He asked me to lay it down. He never gave me hell.

Q. Well, you had violent arguments with him, didn't you?

A. No, we didn't have any violent arguments. If anybody told me to stop working, I would be a damn fool not to, wouldn't I? [52]

* * *

(Testimony of Roy T. Hedrick.)

Q. (By Mr. Merrick): Did you have any trouble with Mr. Cool before he became job steward?

A. Yes. I don't think he was job steward when he ordered me off the raft.

* * *

Q. Well, when he worked back there in 1940 did you have any trouble with him? A. No.

Q. How about the prior job steward, Ed Maher, did you have much trouble with him as job steward?

A. No, I did not.

Q. Did you ever have any arguments with him?

A. Oh yes, sure.

Q. Did those arise out of his duties as job steward? A. Yes. [53]

Q. They were quite frequent, weren't they?

A. They were quite frequent on pike pole pushing. There was not any other activity that I did that I remember arguing with him about.

* * *

Q. Do you know if you might have made any derogatory remarks about the job steward?

A. No, I do not think that I ever did. I don't know. I always thought that a job steward was a thankless job in the Union.

* * *

Q. Now, do you recall the circumstances under which Mr. Cool left the employ of the Leadbetter Logging & Lumber Company in December of 1947?

A. Yes, very plainly—I remember it very well. [54]

(Testimony of Roy T. Hedrick.)

Q. What were the circumstances, Mr. Hedrick?

A. Well, he told me that he was leaving and he was going to go into business for himself.

Q. How were your relations with Mr. Cool when he left to go into business for himself?

A. Very good.

Q. They were friendly? A. Sure.

Q. Do you recall when Mr. Cool again made application for employment with the Leadbetter Logging & Lumber Company? A. Yes sir.

Q. Can you give us the approximate date when he made application?

A. It was either in July or August.

Q. Of 1948? A. Yes, or September.

Q. How did he make this application?

A. By telephone.

Q. And he asked you for a job?

A. That is right.

Q. And what was your answer?

A. I said, "No." [55]

* * *

Q. Now, in September of 1948 do you recall asking George Willett for a boom man?

A. Yes.

Q. What was the conversation when you contacted Mr. Willett?

A. I asked him if he had any men available that were Union men, and he told me that he had one.

Q. And who was that man that he told you of?

A. Bob Cool.

(Testimony of Roy T. Hedrick.)

Q. And what did you say to Mr. Willett on that occasion?

A. I told him that I didn't want him.

Q. Did you give him any reasons?

A. I don't remember whether I gave him any reasons or not. [56]

* * *

Q. I mean there was no question in your mind as to whether or not he was available to go to work if he was offered employment?

A. Well, I didn't know for sure, but he had asked me for a job, and I naturally supposed that he was out of work—yes.

* * *

Q. And he told you that Cool was available?

A. That is right.

Q. And you did not question his availability?

A. No sir.

Q. Do you recall the employee who was finally given this job? A. Yes sir.

Q. Who was that man?

A. E. W. Fromong. [57]

* * *

Q. Well, didn't you question him when you hired him, as to his experience? A. I did.

Q. And what did he tell you?

A. He told me that he had had experience. [58]

* * *

Q. When he finally went to work for you you kept him off the boom, didn't you—off the water?

(Testimony of Roy T. Hedrick.)

A. I had no occasion to put him down there.

Q. You kept him up on loading?

A. That is right, but he was hired as a boom man and he was very soon taken into the Boommen's Local.

Q. But he actually didn't do any work on the water, did he? A. He does now.

* * *

Q. Now, since Mr. Cool left have you had any grievances over your pushing a pike pole?

A. I don't remember. [59]

* * *

Cross-Examination

By Mr. Babcock:

Q. Mr. Hedrick, on these jobs on the boom is there considerable interchange of the employees between one job and another?

A. No, there is not.

Q. Is each man working on the boom—I am using the term "boom" for the whole operation, more or less expected to be able to fill in more or less on any job on the boom?

A. That is right, on all except what we call the premium jobs, such as boat man, head rafter, and our utility man.

Q. And what about the operator of the donkey?

A. The utility man takes care of him. If he is absent, why our utility man takes his place.

Q. It is correct then to say that generally speaking the [61] boom man is expected to be a pretty

(Testimony of Roy T. Hedrick.)

all around man in order to hold down a job? With the exception of a few jobs he is ordinarily expected to do rafting and sorting, and almost anything in the water, and also help on the loading, is that right?

A. Yes sir, that is right. Well, to be *clarified* as a boom man he does not have to know all that stuff, but if he can, why we put him there. We put the man in the place where he is qualified to work. There have been men who have been there for several years that could not go on one of our boats or could not go up to unload—could not run an unloader.

Q. I am not talking about running an unloader, but I am talking about the job that you spoke of as unloading, where they fasten straps.

A. That is all interchanged.

Q. Now, as far as Cool is concerned, he was an all around boom man, isn't that right?

A. Yes. He worked on the water as a boom man.

Q. And he also worked as an unloader—I do not mean running a machine, but I mean on the ground—on the platform?

A. I don't remember at any time that he was ever up there that we tried him on it. But I am quite satisfied that he could have done it if we had asked him to.

Q. Now, when he first started working for the Company this time, that is, beginning I think you said in December, 1946, [62] how long did he work as a temporary employee on this temporary job

(Testimony of Roy T. Hedrick.)

before the time that he was appointed to take the place of the man who left?

A. I think in the neighborhood of two or three weeks.

Q. And now, you spoke of an incident in which you had a disagreement with him at the time that you said that he refused to do some work that you directed him to do. Do you have in mind the incident that I am thinking about? You testified that in your opinion he was not doing the work correctly, and you wanted him to do it a different way, and he refused.

A. Is that the time that I was on the raft?

Q. Yes. Now, about when was that?

A. Why, I would say that it was in January—about January of 1948.

Q. January of 1948?

A. December or January. Wasn't he there in 1947 and 1948?

Q. I understood you to say that he left in December of 1947.

A. January of 1947 then. It was during the time that our water was the worst up there—when the river was the worst up there.

Q. That would be just after he started to work this last time?

A. Yes; not long afterwards.

Q. Now, was that before or after the time that he ceased being a temporary employee and filled in on the regular job? [63]

A. That was after.

(Testimony of Roy T. Hedrick.)

Q. Then after that he continued to work for you until December, 1947, is that right?

A. That is right.

Q. Now, did you have the right to discharge men on the job? A. Yes.

Q. Or to recommend their discharge?

A. Yes sir.

Q. But you did not consider this incident sufficient for discharge? A. Yes sir, I did.

Q. Did you attempt to discharge him?

A. No sir, I did not.

Q. Were there other men there at that time that you had this disagreement with him on the raft?

A. Yes.

Q. And did they participate in the discussion?

A. I don't remember that any of them did.

Q. What was it that he was doing which you ordered him not to do?

A. Well, when we work a raft in swift water, you all have to work on one side of the raft. In other words, you all have to work in what we call the same hole, and part of the crew was spread on one side of the raft and the other part on the other, and I asked them to come all on that one side, and Mr. Cool [64] felt that he was being abused. He was on the opposite side, and right away he told me that I had no business on the raft and I had no business to give them orders in any way on the raft.

Q. His objection was then that the order should come through the head rafter and not through you

(Testimony of Roy T. Hedrick.)

directly, is that correct? A. That is correct.

* * *

Q. What had been the practice there? Had you been in the practice of giving orders directly, or through the head rafter?

A. I had been in the practice of giving orders directly.

Q. Did you do it after that?

A. No. After that I gave them through the head rafter. [65]

* * *

Q. Now, was that the only incident in which you had any disagreement with Mr. Cool before the time that you knew for certain that he was the job steward? A. I think it was.

Q. And after that, up until the time that he left there each of your disagreements arose out of some objection that he made as job steward to something that was going on or was not going on, isn't that correct? A. Acting as job steward?

Q. Yes.

A. Will you repeat that question again?

* * *

A. No, I do not think that he was acting as a job steward, the way I think that a job steward should assume his functions. [66]

* * *

Q. On any other occasion after that time when you had a disagreement with him it was the result of some objection that he was making with respect to

(Testimony of Roy T. Hedrick.)

the practice that was being followed in the work, is that correct? A. That is right.

Q. And during all of that time he was the job steward?

A. Well, I don't know about the first time. At the time when he ordered me off the raft I do not think that he was job steward, but he was job steward when he stopped the work.

Q. And you knew that he was job steward?

A. I knew that he was job steward.

* * *

Q. So at the time that you spoke to Willett you knew that Fromong was seeking the position? [67]

A. That is right.

Q. And you, nevertheless, asked Willett if he knew of a good boom man?

A. Yes, I asked him.

Q. Now, you knew at that time, didn't you, Mr. Hedrick, that Fromong was not an all around, experienced boom man?

A. No, I didn't know it. He was recommended to me by a boom man as a boom man.

Q. But did you question Fromong himself as to his experience? A. No, I did not.

* * *

Q. Did you know at that time how his experience compared with Bob Cool's? A. No, I did not.

Q. Well, you knew that Bob had had a great many years experience, didn't you? A. Yes.

Q. Some 15 or 18 years experience as a boom man?

(Testimony of Roy T. Hedrick.)

A. Well, I didn't know actually how many years he had.

Q. And as far as Fromong was concerned you just heard through hearsay information that he had done some boom work, that is correct, isn't it?

A. That is right. [68]

* * *

Q. Has it been your practice to ordinarily hire all around boom men when they were available? [69]

A. When they were available, yes.

* * *

GEORGE WILLETT

called as a witness on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Merrick:

Q. What is your name?

A. George Willett.

Q. What is your address?

* * *

A. My address is Route 1, Box 250, Oswego, Oregon.

Q. And what is your occupation?

A. My occupation is boatman on the boom at Oswego.

Q. You are employed by the Leadbetter Logging & Lumber Company, are you? [70]

A. Yes sir.

(Testimony of George Willett.)

Q. How long have you worked for the Leadbetter Logging & Lumber Company?

A. Well, I would say off and on for seven years.

* * *

Q. Well, have you been employed for the last seven consecutive years? A. Yes.

Q. As a boatman?

A. No. As a boatman for about the last four I would say.

Q. What other jobs have you held out there?

A. Well, I have been a rafter, and an unloader, a pocket man, sorter, and so on.

Q. In other words, you have worked on most of the jobs around the boom? A. That is right.

Q. And now, do you also hold an official position in the Union? A. Yes sir.

Q. That is Local 11-81, of the IWA?

A. Yes.

Q. What is your position?

A. Business Agent and Financial Secretary.

Q. What are your duties as Business Agent and Financial [71] Secretary?

A. As Financial Secretary, to collect dues and maintain the financial condition of the Union, and pay the bills, and so forth, and as Business Agent to take care of any grievances that come about on any of the various jobs on the river under our jurisdiction.

Q. Do you also take part in negotiations of contracts?

(Testimony of George Willett.)

A. Yes. I am the spokesman for the Union committee.

Q. Have you taken part in the negotiation of the contract with the Leadbetter Logging & Lumber Company? A. Yes, sir, that is right.

Q. Do you have a copy of that contract with you? A. Yes, I have.

* * *

Mr. Merrick: May we stipulate that a copy may be substituted for this original?

Mr. Tremaine: Yes.

* * *

Mr. Merrick: I would like to have this copy marked as General Counsel's Exhibit 2 for identification.

(Document above referred to marked General Counsel's Exhibit 2 for identification.) [72]

Mr. Merrick: Do you care to examine the original with the copy, Mr. Tremaine?

Mr. Tremaine: Yes, I would like to (examines documents). We have no objections.

* * *

Q. (By Mr. Merrick): Is that the particular labor contract or agreement under which you are working on the Oswego boom?

A. That is right.

Q. What was the original expiration date of that contract? Will you find that out for us, please?

A. Well, there is no original expiration date

(Testimony of George Willett.)

under that contract. It is continued in full force and effect each year after April 1st until either party breaks off negotiations.

Q. Well, now, that contract originally expired on April 1, 1948, did it not? A. Yes. [73]

Q. In other words, you are still conducting negotiations looking toward a new contract?

A. That is right.

Q. And negotiations have not been broken off?

A. No sir.

Mr. Merrick: I would like to offer General Counsel's Exhibit 2 in evidence.

Trial Examiner Plost: When was this contract, which has been marked General Counsel's Exhibit No. 2 first entered into between your Union and the Respondent company?

The Witness: It was first entered on July 18, 1947.

Trial Examiner Plost: It was first entered into on July 18, 1947?

The Witness: Yes sir.

Trial Examiner Plost: Is there any objection to the introduction of the document marked General Counsel's Exhibit No. 2?

Mr. Tremaine: No sir.

Trial Examiner Plost: There being no objection, the document marked General Counsel's Exhibit No. 2 will be admitted in evidence. I take it that there is no objection on the part of the Union?

Mr. Babcock: No.

(Testimony of George Willett.)

(Document above referred to, heretofore marked General Counsel's Exhibit 2 for identification, received in evidence.) [74]

GENERAL COUNSEL'S EXHIBIT NO. 2

* * *

Article IX—Adjustment of Complaints

1. Boom Committee and Job Steward:

(a) The crew of the Employer shall elect from its membership a Boom Committee, which may consist of an individual or not to exceed three (3) persons, which shall represent their members. One (1) committeeman will be designated the "Job Steward" and serve as spokesman for the committee. In the event of the resignation, disability, disqualification, or death of any member of the Boom Committee, his successor shall be elected by the crew. During the interim the remaining members shall have power to act.

2. Handling Complaints, Suspension or Discharge:

(a) Should there be any dispute or complaints or an alleged discrimination of any kind against either an employee or the Employer, the employee or employees concerned shall continue to work under the conditions then existing, except in case of suspension or discharge hereinafter provided for, and such dispute, complaint, or grievance shall first be taken up, ordinarily off shift, with the foreman in charge by the Boom Committee, accompanied by

(Testimony of George Willett.)

said employee or employees. If no satisfactory settlement is made, the Boom Committee shall immediately place the case before a representative of the Employer and a representative of the local union. In the event no agreement can be reached within a three (3) day period, the matter shall be referred to the joint committee of Employer and employees as outlined in paragraph 3 of this article.

(b) Any settlement agreed upon between the two (2) committees on suspensions or discharges shall be final and binding on all parties concerned. If the Employer or the joint committee finds the man was unjustly discharged, he shall be reinstated without loss of pay.

(c) The Union committee shall have time to get the approval of the Union before signing any settlement. The Employer's committee also shall have time to consult their principals before signing any settlement.

3. Joint Handling of Differences:

(a) The joint committee shall be made up of three employer members selected by the management of the operation where the disagreement exists and three members selected by the Union committee. The joint committee shall have sole jurisdiction over disputes, complaints, grievances, interpretations of this agreement, or alleged discriminations properly referred to it in accordance with the paragraph above. In the event the joint committee is

(Testimony of George Willett.)

unable to make a recommendation on any matter properly placed before it, as provided above, within a reasonable period of time after such reference is made, the matter in dispute shall be referred back to the Employer and to the Union for the recommendation of each. The boom committee and the Employer will again meet and inform each other of their recommendations. All matters referred to the joint committee shall be in writing, both parties giving their statements in detail. When one party has referred a difference to the joint committee, the other party must accept such reference. The Union committee shall have time to get the approval of the Union before signing any settlement. The Employers' committee also shall have time to consult their principals before signing any settlement.

* * *

Received in evidence October 18, 1949.

Q. (By Mr. Merrick): Now, prior to the signing of the agreement what was your contract situation with the Company at Oswego?

A. Prior to that there was no agreement. There was no signed agreement with the Company.

Q. Well, did you work under any sort of arrangement or verbal agreement with the Company?

A. It was a verbal agreement that the conditions of the agreement would be lived up to.

* * *

Q. (By Mr. Merrick): In other words, you

(Testimony of George Willett.)

lived under the master agreement that was in effect in the industry? A. Yes, sir.

Q. And that was the same contract which was in effect throughout the industry?

A. No. Throughout this Local Union only.

Q. Now, Mr. Willett, in your job at the Leadbetter Logging & Lumber Company did you have occasion to work with Mr. Cool? A. Yes. [75]

* * *

Q. (By Mr. Merrick): Did you have opportunity to observe him working as a boom man—I am referring to Mr. Cool. A. Yes, I did.

Q. Was he a competent boom man?

A. Very competent.

Q. Did he get along with the other employees?

A. He got along well, yes.

Q. To your knowledge did he ever have clashes with the other employees?

A. Not that I know of.

Q. Did you have occasion to observe his relations with Mr. Hedrick? A. Yes, I did.

Q. What were they?

A. They were good except, of course, when there were any grievances, there were little arguments that went on then. They got a little bit violent at times. [76]

* * *

Q. (By Mr. Merrick): Are you familiar with Mr. Cool's record as a boom man?

A. I am familiar with it as long as he worked on the job down there—yes.

(Testimony of George Willett.)

Q. Did you ever have occasion to send him out on jobs as a boom man?

A. Yes. I sent him down to the Shaver Transportation Company.

Q. Did you ever have any complaints as to his ability—— A. (Interposing): No.

Q. As a boom man? [79] A. No.

Q. In your position as Business Agent of the Union and as an employee of the Leadbetter Logging Company, did you ever hear any complaints of his ability as a boom man while employed at the Leadbetter Company? A. I never did.

Q. Now, in the period that Mr. Cool worked at Leadbetter's from December, 1946, to December, 1947, do you know from your own knowledge if any question was ever raised by any employee of the boom as to the willingness of Mr. Cool to work?

A. Had there been any, I am sure that I would have heard it. I never did hear of any.

* * *

Q. You never heard it? A. No.

Q. In your position as Business Agent would you be in a position to get those complaints from management if they were given?

A. I would think so. The grievance procedure calls for that.

Q. And you are the official representative of the Local at the boom? A. That is correct.

* * *

Q. Do you know when Mr. Cool was first appointed job steward? [80]

(Testimony of George Willett.)

A. No, I don't. It was several months I think after he came on the job.

Q. Was he appointed or elected?

A. He was elected by the crew.

Q. Generally how is a job steward elected?

A. He is elected by the crew.

Q. They gather together and hold an election and vote by ballot? A. Yes, sir.

Q. All the members of the crew? A. Yes

Q. What is the function of a job steward?

A. A job steward is to police the contract and maintain the working conditions on the job—the Union working conditions.

Q. Is he required to act as a spokesman for the Union?

A. As a rule yes, although a committee can elect a spokesman any time that they see fit, but as a general rule the job steward is the spokesman.

Q. In Mr. Cool's case was he generally the spokesman? A. Yes, he was.

Q. Now, did you ever have any complaints from management as to Mr. Cool exceeding his authority as a job steward? A. No formal complaints.

Q. Well, did you ever have any informal complaints?

A. One time Mr. Hedrick complained that he thought that he [81] was exceeding his authority.

Q. On what occasion was that?

A. At that time he was not acting as job steward. I will have to take that back. That was during the time that he had the argument on the raft about placing the logs.

(Testimony of George Willett.)

Q. But while Cool was job steward did you have any complaints? A. Not to my knowledge.

Q. And now, if any complaints were made, would they be made to you?

A. Well, I would think so—if he had a formal grievance.

Q. That was the procedure that was generally followed? A. Yes.

Q. Now, if Mr. Cool were exceeding his authority, would that be a grievance as far as the Company was concerned?

A. Management could make a regular grievance of it.

Q. And they would have just as much a right to prosecute a grievance as the Union?

A. That is right.

Q. Now, while you were employed at Leadbetter's in the period from December, 1946, to December, 1947, did you ever have occasion to see Mr. Hedrick pushing a pike pole? A. Yes, I have.

Q. How often have you seen him pushing a pike pole?

A. Well, several times I would say.

Q. Generally what action would be taken on that? [82]

A. Well, there were some times when grievances were made out of it, and we took it up with management, and management would generally agree that the contract called for him not using the pole or doing boom men's work, and then it would be violated. So then the job steward would either take

(Testimony of George Willett.)

the committee with him, or possibly was authorized to go by himself and tell the foreman not to do that work.

Q. The job steward had that authority?

A. That is right.

Q. Now, calling your attention to September of 1948, were you approached by Mr. Hedrick looking for boom men?

A. Yes, I was.

Q. Could you tell us just what it was—just what the conversation was on that occasion?

A. The conversation was fairly short. I was operating a boat right in the gap at the time, and Mr. Hedrick came down and said, "George, have you got a competent man,"—not a competent man—"have you got a Union man available—a boom man available?" And I says, "Yes," and he says, "Who is it?" And I said, "Bob Cool." And he said, "Well, I thought it was understood that I was not going to hire Bob Cool." So then I asked him why. Well, he stated that he was a troublemaker, or he made trouble. He didn't go into details of what happened a year and a half ago, except that he was a troublemaker and incompetent, and didn't do his work, and so forth. [83]

* * *

Q. Was there any question raised at that time as to Cool's availability or willingness to go to work?

A. None at all.

Q. What general procedure was followed by the Union in sending an employee to a job?

A. The procedure generally is that the Company will call me up and state that they want two or

(Testimony of George Willett.)

three men, and the Union members who are out of work generally let me know that they are out of work, and then I call them up or get in contact with them and send them out on the job.

Q. Is it necessary for the applicant to personally appear? A. No.

Q. Before you send him out? A. No.

Q. I mean, personally appear at the employer's office? A. No, it is not.

Q. Now, is that the procedure that was followed when you sent Mr. Cool to the Shaver Company? A. That is correct.

Q. Did you have occasion to know the man who was hired to fill [84] this vacancy in September, 1948?

A. I know him very, very little. I met him out at a picnic. I think that was about the first time that I had seen him. I met him at a Union picnic which was held just prior to that—a month or two prior to that.

Q. And what man was that? A. Fromong.

Q. Did you have occasion to send him out on any jobs?

A. Yes, he approached me at the time that he wanted me to get him a job on the boom.

* * *

Q. And did you send him out on a job?

A. Yes, I sent him out to Dick Olson.

Q. And what position did you send him out to fill? A. Boom man.

(Testimony of George Willett.)

Q. Did you ever hear from the employer regarding him?

A. The employer was not satisfied with the man.

Q. And was he sent back to you?

A. He was laid off.

Q. How many days did he work?

A. I don't know. He told me that he worked there a week, [85] and I was told that he only worked there half a day, but it was a very short time anyhow.

Q. Do you know if Mr. Fromong was a member of your Local at the time that he was hired in September of 1948?

A. No, he was not.

Q. Is he a member now?

A. Yes.

Q. Did you take part in the grievance procedure that arose after Mr. Cool was denied employment?

A. Yes, I did.

Q. Can you tell us briefly just what you know about it, and what part you took in it?

A. The part I took in it was that the committee met—the committee called for a meeting with Mr. Hedrick, and we met up in his office, and there we took the position that Cool was a competent man and that he should be hired on that job. And Mr. Hedrick took the position that he was incompetent, and so on, and he would not hire him. So then we immediately—not immediately, but some time later called a meeting of the higher officials.

Q. What higher officials took part in that meeting?

A. At that time there was Mr. Kerry, the su-

(Testimony of George Willett.)

perintendent, and Mr. Sullivan, their labor relations man.

Q. And who represented the Union?

A. The Union was represented by Mr. Garrison, our District [86] Secretary, and myself as Business Agent of the Local, and the local committee—I mean the job committee.

Q. And what was the result of that meeting?

A. The result was that we went through the case again, and at that time we went into the competency of Mr. Cool a little more, and the foreman qualified his statement by stating that he thought that Cool was competent all right, but he would not do his work. And we took the position that he was entitled to the job, and the Company—Mr. Sullivan, that is, took the position that the Company would hire whoever they saw fit. And when we were not satisfied with the decision why he suggested that if we didn't like it we could file charges.

Q. And that was the end of Mr. Cool's grievance?

A. That is right. It was agreed at that time that all the procedure of the grievance machinery had been lived up to by both parties.

Q. Is that the procedure under your contract?

A. Yes, it is. [87]

* * *

(Testimony of George Willett.)

Cross-Examination

By Mr. Babcock:

Q. Mr. Willett, I would like to ask you to explain for the record a little more the respective functions and duties of the committee—of the job committee and the job steward under your contract.

A. The job committee polices the contract and the working conditions on the job, and the job steward acts as the spokesman for the committee in policing the contract and the working conditions.

Q. Has it been the practice in the Leadbetter operation for the job steward to speak directly to the foreman on any particular matter that comes up which he observes, without the whole committee acting?

A. Yes, that happens.

* * *

Q. (By Mr. Babcock): Was that the practice before Cool acted as job steward?

A. That is right.

* * *

Q. Now, from your observation of Cool will you state what type of work on the boom he does, and is qualified to do? [88]

A. I would say that he is an all around rafter and undoubtedly—I do not know whether he has done any unloading. I understand that he is a boat operator, however, and does all around boom work.

(Testimony of George Willett.)

Q. When you say, "unloading," what do you mean by that?

A. Well, I mean the only part of the unloading that I don't know whether he can do or not is the actual running of the unloading machine itself. [89]

* * *

Q. What is the situation on that operation with respect to the men being able to do most of the work or most of the jobs? I mean, are most of the men able to do various kinds of work or not?

A. Yes, they are.

Q. Have you observed the work of Mr. Fromong?

A. Yes, I have.

Q. And what kind of work has he done?

A. He is an unloader. He works on the hill hauling lines and knocking pins. He was not working on the machine.

Q. Has he done any work on the river?

A. I saw him down there on very rare occasions for a short time.

Q. Are you able to state whether he is qualified to do all around boom work?

A. In my opinion he is not.

Q. Now, when the matter of the Company's refusal to hire Mr. Cool was taken up with the Company, first with Mr. Hedrick, and later with Mr. Kerry and Mr. Sullivan, were they informed any time how the other men in the crew felt about the matter, or how they stood on the matter?

A. I think in the grievance that we took up

(Testimony of George Willett.)

with the management we stated that the crew was 100% behind Cool on that matter. [90]

* * *

Q. Now, did I understand you to say that the practice was that when you men were needed for the boom, that the foreman would come to the Business Agent and ask him if he had any boom men available?

A. Yes, that is the general practice—yes.

Q. And that is what the foreman, Hedrick, did in this instance, isn't it? A. Yes. [91]

* * *

Redirect Examination

By Mr. Merrick:

Q. I believe you testified that under the RFC you worked under the master contract in the area?

A. No, the local agreement. The agreement in the Local Union covers I think about 15 operations in this area, and the contracts are all the same.

Q. Well, it was more or less an oral agreement to work under that particular contract?

A. Yes, that is true.

Q. Is that essentially the same contract which is General Counsel's Exhibit 2?

A. Yes. There are some minor changes in the grievance procedure and things that are not too important. [95]

* * *

ROBERT IRWIN COOL

called as a witness on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Merrick:

Q. State your name.

A. Robert Irwin Cool.

Q. What is your address?

A. 1901 14th Street, Oregon City, Oregon.

Q. What is your occupation at the present time?

A. I am an organizer.

Q. An organizer? A. Yes, sir.

Q. By whom are you employed?

A. By the IWA-CIO.

Q. Is that a full time or a part time job?

A. It is a part time job.

Q. What area do you organize in?

A. I work anywhere from the Pacific Coast—anywhere on the Pacific Coast from British Columbia to the Oregon border—— [96] to the Oregon-California border.

Q. How long have you been on that job?

A. About a year.

Q. In other words, since about October, 1948?

A. Yes, sir.

Q. By whom were you employed prior to that?

A. The Shaver Transportation Company.

Q. And what was your employment with Shaver?

A. Well, general boom work—knocking, rigging

(Testimony of Robert Irwin Cool.)

and general boom work—knocking dog lines. That is still rigging.

Q. How long were you with Shaver?

A. About six months.

Q. And prior to that what did you do?

A. Well, I was in business for myself as a cleaner.

Q. How long were you in business as a cleaner?

A. Well, from about the first of January of 1948 until April.

Q. And prior to that where were you employed?

A. The Leadbetter Logging Company.

Q. How long were you with Leadbetter Logging Company? A. About 12 or 13 months.

Q. What was your occupation with Leadbetter on that occasion? A. A boom man and rafter.

Q. Have you ever been employed on the Oswego boom prior to that? A. Yes, I have. [97]

Q. You heard Mr. Hedrick testify that you had worked in 1940 at the Oswego boom, is that correct?

A. Well, about 1941 I think is when I went to work there.

Q. At that time Mr. Hedrick was the head rafter, was he? A. That is right.

Q. How long did you work at the Oswego boom on that occasion?

A. Until after the war broke out.

Q. Was the Scott Rafting Company running the boom at that time?

A. Well, Mr. Scott at that time was the head of

(Testimony of Robert Irwin Cool.)

it. I think that the RFC actually had it, but I believe that Scott was in the position that Mr. Kerry is in now. But I am not sure of that fact. I think it was RFC.

Q. And were you working for Shaver while you lived in Oregon City? A. Yes, sir.

Q. How far is Shaver's place located from Oregon City?

A. From my place to the Shaver Transportation Company is between 16 and 18 miles.

Q. And how far is the Oswego dump of the Leadbetter Company from your home?

A. Six miles.

Q. How did you travel to these places?

A. By automobile.

Q. In your own car? [98] A. Yes sir.

Q. Now, how long have you been working as a boom man? How long have you worked in the industry? A. Practically 18 years.

Q. 18 years as boom man?

A. That is right.

Q. Outside of that 18 years did you ever work in the logging industry itself? A. Yes, sir.

Q. What type of work have you done in the logging industry?

A. Well, I have worked in the woods, and I also have worked on river drives and stuff like that.

Q. Are you thoroughly familiar with all the jobs around a dump? A. A logging dump?

Q. Around the logging dump, yes.

(Testimony of Robert Irwin Cool.)

A. Yes, I am.

Q. Around a boom? A. Yes, I am.

Q. What jobs have you had around the boom?

A. I have done everything excepting the unloading. That is, not running a donkey.

* * *

Q. Have you ever run a boat? [99]

A. Yes.

Q. Have you ever been employed as a head rafter? A. Yes.

Q. Now, when you worked at the Oswego dump back around 1940 or 1941 under Mr. Hedrick, what were your relations with Mr. Hedrick?

A. Very good.

Q. At that time was any criticism made of your work? A. Not that I know of.

Q. Well, did he ever criticize you on your work?

A. No.

Q. When you came back to Leadbetter in December, 1946, how did you happen to get on at that time?

A. I believe I talked to Mr. Kerry on the unloading dump up on top of the hill about a job, and we got to talking, and I do not know how it came around, and he said if I knew "Pan" Hedrick when he found out that I had worked on the job before.

* * *

Q. You mean Mr. Roy Hedrick who has been a witness here? A. Yes.

Q. And he is sometimes called "Pan" Hedrick?

(Testimony of Robert Irwin Cool.)

A. Yes sir. He asked me, "Do you know 'Pan' Hedrick?" And I said, "Yes, I do," and I said, "In fact, I happened to have worked with 'Pan' Hedrick." And he went down on the boom and talked with "Pan" Hedrick, and came up and said, "Can you [100] go to work at noon?" And I said, "Well, yes, I can. I haven't got my shoes with me, but I can go home and get them," and I did, and that is what I done.

* * *

Q. Do you recall when you got the job of job steward?

A. About three months after I was there.

Q. That would probably be about February of 1947?

A. That is right.

Q. And how did you get that job?

A. By election of the boom men on that job.

Q. They elected you to the job as job steward?

A. That is right.

Q. Who else was with you on the grievance committee at that time?

A. Ernie and "Bud" Salsbury.

Q. What was the nature of their jobs on the boom?

A. Rafting and unloading.

Q. When they picked a grievance committee did they usually try to pick the men from various job categories or pick them from one section, or how?

A. Well, not necessarily. We just figured that these two men [101] were good men to pick, and that is why we picked them.

Q. Just in general what are your duties as a job steward on the boom?

(Testimony of Robert Irwin Cool.)

A. Well, I represent their Union. If any matters come up, the crew come to me and suggest that this thing is not going right; or that thing is not going right, and that they think that we should take it up, and then I take my committee and talk things over, and we go before the foreman and present our case to him.

Q. And that would be Mr. Hedrick?

A. Yes, sir.

Q. And when you presented a grievance to Mr. Hedrick did you always have a member of the committee with you?

A. Yes, sir.

* * *

Q. Why would you have a man with you?

A. Always for a witness.

Q. How often did you take a grievance up to Mr. Hedrick?

A. I cannot tell you that, but it ran quite numerous.

Q. Well, just how many times a week would you have grievances with Hedrick?

A. Oh, I would say anywhere from two to four times a week—for a period. [102]

Q. For what period?

A. Of six months.

Q. After that did they slack off?

A. Yes, they did.

Q. Now, were you always the spokesman that took these grievances up with Hedrick?

A. Yes, sir.

(Testimony of Robert Irwin Cool.)

Trial Examiner Plost: Would you put the time of this six months period in the record, please?

Q. (By Mr. Merrick): That six months period would then be commencing in February of 1947?

* * *

A. I would say that is approximately when it was.

Q. That is when you first became job steward?

A. That is right.

Q. Generally what were the nature of these grievances that you would take up with Mr. Hedrick?

A. Well, the first of them were his pike pole pushing. That was the most of it. More than anything else was his pushing the pike pole.

Q. How would you present a grievance on pushing the pike pole to Mr. Hedrick?

A. Well, I would go up and I would simply tell him that I thought that he was violating the contract. Sometimes I would [103] not go that far; I just would walk up the boom and he would see me coming, and he would lay the pole down and go up the hill.

Q. Was that a violation of the contract?

A. That is right.

Q. What other beefs did you have with "Pan"?

A. Well, there was a beef over this skid that he has referred to. , (

Q. What were the circumstances surrounding that grievance? Can you tell us in your own words, and when it occurred, and what happened?

(Testimony of Robert Irwin Cool.)

A. I cannot recall the exact date when it occurred, but it was around about 10 o'clock in the morning, and I had been told that we were going to put in skids that morning, and I went over and talked to one of my grievance committee men, and I told him that they were going to put in skids up here, and he says, "I do not think that we should put in any skids. What do you think about it?" And I said, "That is right." I said, "We have unloaded enough logs this morning. We have got enough work here, and, besides, there are some more loads coming this afternoon." So I went over the hill to see Mr. Hedrick, and I took this committee man with me.

Q. Who was it that you took?

A. Ernie Brazeau.

Q. And what happened over the hill? [104]

A. When we got over the hill why Mr. Hedrick was standing on the brow log and I believe Ed Maher was standing on the brow log also, and he came down on the road and met me.

Q. Who came down and met you?

A. Mr. Hedrick did.

Q. Mr. Hedrick came down?

A. Yes, and he says, "Now, Bob," he says, "if you are going to come up here and tell me that I cannot put in any skids," he says, "you are all wrong."

Now I was quite dumfounded when he approached me on the situation. Actually that is what I was coming up there for—I will admit that that

(Testimony of Robert Irwin Cool.)

was what I was coming up there for, but he beat me to the punch. And I says, "I believe, Mr. Hedrick, we have unloaded enough loads this morning, especially when we have some loads coming in this afternoon—quite a number of loads coming in this afternoon, and we have a lot of work out here to be done on the boom," which we had four rafts hanging on the outside and one in the raceway, which made five rafts hanging there, and they all had logs to be rafted. Then this discussion came up between Mr. Hedrick and myself and Ernie Brazeau.

Q. Were you the spokesman of the committee on that occasion?

A. Yes, that is right, I was.

Q. And what was the result of that discussion?

A. He then went in to call up—he said, "I will go in and [105] call up the Company about this situation," and he said, "just leave the skid hanging there." And I said, "Well, I believe you are violating the State Safety Code by letting it hanging there and I believe it should be put down." And he said, "Let it hang there. That is good enough for my money." And that is what happened. And then he came in and he said, "Let it set there."

Q. And that work was not done?

A. The skid was not put in.

Q. What is that, maintenance work or production work?

A. That is maintenance work. After I pointed

(Testimony of Robert Irwin Cool.)

out to Mr. Hedrick that tomorrow, which would be Tuesday—this was on a Monday—I said, “Tuesday would be a slack day, and that would be a good time to put it in.”

Q. What had been your policy before that?

A. Tuesday was a slack day, and that was when we used to do all our maintenance work.

Q. Had there been any rule as to whether or not you would do maintenance work on a day when you had a great deal of production work?

A. Yes. We had an understanding that if we unloaded a certain amount of logs there would be no bull cooking.

Q. What is, “bull cooking”?

A. Maintenance work.

Q. Are you referring to the rule or agreement that Hedrick [106] testified about?

A. I am referring to this, that before we had had this actual agreement on the skid we had had an understanding with Mr. Hedrick that any time there were fifty loads or more, there would be no bull cooking.

Q. And on a day that you put in more than fifty loads, when the men finished putting in the loads what did they do—I mean, say you put in sixty-five loads. Is that the end of your work day then?

A. Not necessarily. We gave him an allowance. If we knew that was all that was coming in, we would do some bull cooking. We went up as high as seventy loads after we had a personal grievance.

(Testimony of Robert Irwin Cool.)

Trial Examiner Plost: When you speak of loads, do you mean carloads of logs?

The Witness: Yes sir.

Trial Examiner Plost: And when you speak of a skid do you mean the skid that goes from the car down to the river, or what?

A. The skid lays there on this dump. It is a dump made of skids. There is a brow log up here (indicating) and there is a brow log down here (indicating), and there is a skid on top of those brow logs. And then the logs are put on that skid, strapped down, and they are rolled down over the skids.

Trial Examiner Plost: They are rolled down over the skids?

The Witness: Yes, into the river. [107]

* * *

Q. (By Mr. Merrick): Now, on this day when this grievance took place, what did the men do—after they put in these 21 loads, or whatever it was, what did they do while waiting for the other loads to arrive?

A. He said that there were 21 loads. I said that there were 40 loads.

Q. Well, whatever it was, what was done in the interim period?

A. We worked to almost noon, and then about 2 o'clock the loads came in.

Q. Then you knocked off from noon to 2 o'clock, is that right? A. That is right.

Q. Is that the procedure that was always followed? A. Yes, sir.

(Testimony of Robert Irwin Cool.)

Q. And has that been followed since then to your knowledge?

A. To my knowledge it has.

Q. Then that was the custom?

A. Yes, sir.

Q. And that was the custom throughout the industry? A. Yes, sir. [108]

* * *

Trial Examiner Plost: Well, is it the custom that you took your noon hour from 12 to 2, or is it the custom that you knock off and do not work after you have got a certain amount of work done?

The Witness: That is right.

Trial Examiner Plost: What is it?

The Witness: When the work is through, unloading logs, you are done.

Trial Examiner Plost: Until the next load comes in?

The Witness: Until the next day in most cases.

Trial Examiner Plost: Then you go home?

The Witness: Yes sir.

* * *

Q. Now, on this day in question you had a load of logs coming in at 2 o'clock?

A. Yes sir. [109]

Q. Do you know how many loads were supposed to come in that day?

A. Well, I said 40 loads.

Q. I mean, how many were going to come in at 2 o'clock?

(Testimony of Robert Irwin Cool.)

A. Well, Mr. Hedrick said that there were 50, but I thought there were 30.

Q. But anyway after those loads of logs arrived, no matter how many they were, and you put them in, then what did the men do?

A. We rafted them up.

* * *

Q. Did you have any grievances over seniority?

A. Yes, sir.

Q. What did you have on that?

A. That was over a man by the name of Olson and a man by the [110] name of Buehl Patterson. It was over Buehl Patterson and Olson. And the way I understand it now, he hired Olson the day before he hired Buehl Patterson, but Buehl Patterson went to work a day before Olson did. So the crew came to me and says to me, "How about this here? Buehl Patterson was hired a day after Olson was hired, but still Buehl Patterson went to work the day before? Who has got the seniority?" "Well," I says, "speaking as a representative of the Union I would say that Buehl Patterson had one day more seniority," and the crew said, "That is what we think."

Q. Now, Patterson was hired after Olson, but he went on the job——

A. (Interposing): A day before. And the crew says to me, "That is what we figure, but we understand that Mr. Hedrick is going to object to that."

Q. Well, did you take that up with Mr. Hedrick?

(Testimony of Robert Irwin Cool.)

A. Yes, we did.

Q. And what was the conversation with him?

Q. Well, the committee and myself went up to Mr. Hedrick and we discussed the thing, and we had quite an argument over it, and finally Mr. Hedrick said, "Well, we will see when the time comes who has got the seniority," and that is all that was said.

Q. In other words, when the layoff came it would be settled?

A. That is what I thought anyway.

Q. Was that a heated discussion? [111]

A. Quite a heated discussion, yes.

* * *

Q. Do you recall any other particular grievance that sticks out in your mind? A. No.

Q. Now, you heard Mr. Hedrick testify, did you not? A. Yes.

Q. You were here during Mr. Hedrick's testimony? A. That is right.

Q. Do you recall the incidents which Mr. Hedrick referred to when you left the job to go and see George Willett about some Union business—do you recall that incident? A. Yes.

Q. Can you tell us the circumstances surrounding that leaving the job by you?

A. Well, I remember leaving the job, all right. I don't know as I did say anything—I do not know as I did ask Mr. Hedrick about leaving the job.

Q. You say that you did ask him?

(Testimony of Robert Irwin Cool.)

A. I don't know as I did ask Mr. Hedrick about leaving the job. I won't say as to that, but as far as the rafting of the logs were concerned, they were all rafted, and I went up to see Mr. Willett, and I went up to see Mr. Willett, and I was gone for approximately an hour, or an hour and fifteen minutes, or somewhere along in there. I don't know how long I was gone, but I do remember when I came back that Mr. Hedrick jumped onto me about leaving this job and [112] things like that. I had also, after I got back to the job—I had found out that he had half of the crew down there moving a boathouse.

* * *

Q. Was it the Leadbetter Logging Company's boathouse?

A. No. It was off the job completely. And I says to him, "Being that you are laying the stick on me, I believe you are stepping out of line when you take these men off the job and put them on another job to move a boathouse, when they are not under state insurance in that case," because they were not covered by state insurance when they were doing this other job, and I think he was violating the law right there, and I merely pointed out to him that he was stepping over the traces by doing that.

Trial Examiner Plost: Before you go any further, can you tell me when this hapepned?

The Witness: No, I cannot. [113]

* * *

(Testimony of Robert Irwin Cool.)

Q. (By Mr. Merrick): During the time that you were employed on this last occasion did Mr. Hedrick have occasion to criticize your work?

A. Only once, I believe.

Q. Was that the occasion that he referred to in his testimony today? A. That is right.

Q. Just tell us what happened on that occasion.

A. Well, we were rafting logs in fast water, and we were brailing logs down there. And there were two logs coming down the river at the same time. One was ahead of the other. And I was making a spread, and there was another man alongside of me, but I do not remember who that was that was alongside of me that was making this spread, and there were two or three logs in behind me, and this back log was coming down and I was going to kick these other logs over with my feet, or with one foot, rather, to let this one log come in. Still I was holding the spread for this other log and he said, "Make a spread there, Bob, to let that log come in there." Well, I didn't say anything because I had my own mind made up what I was still going to do. I was still holding the spread open to let this [115] one log come in, because it was ahead of this other log, and I had in my mind to let the other one come in later, which I was going to spread over with my feet later on, and I didn't make any attempt to let go of my hold.

Q. If you had let go of your hold what would have happened?

A. If I had let go of my hold that one log would

(Testimony of Robert Irwin Cool.)

come in there, and it would have gone in cross-ways, and it was ahead of the other log that would be spread with my foot. You might wonder how I would spread with my feet when I was already standing on a log, but it is a surprising thing what you can do with your feet. But, nevertheless, he said, "Open that hole up there to let that log in there."

Trial Examiner Plost: Who said that to you?

The Witness: Hedrick said that to me, and I let all holds go.

Trial Examiner Plost: You were working in fast waters?

The Witness: Yes sir.

Trial Examiner Plost: Then you let all holds go? [116]

* * *

Q. (By Mr. Merrick): Was there any discussion with other members of the crew over this incident?

A. Yes. He asked Ed Maher at that time, who was job steward, who was right on this situation, and Ed Maher told him that there was no question in his mind but that I was right.

Q. Was there anything further done about it?

A. No. He went up and talked to George Willett, and I don't know what was said between him and George Willett. [117]

Q. But nothing was done about it to your knowledge? A. No.

Trial Examiner Plost: But he never talked to you about it?

(Testimony of Robert Irwin Cool.)

The Witness: That is right.

* * *

Trial Examiner Plost: I say as far as you were concerned, did anyone from the Company talk to you?

The Witness: No.

Trial Examiner Plost: As far as you were concerned it was a closed and ended incident?

The Witness: That is right.

Q. (By Mr. Merrick): Is that the only time that you were criticized?

A. As far as I know, yes.

Q. And all the other run-ins that you had with Hedrick arose through grievances?

A. Yes, sir.

Q. And you were spokesman? A. Yes, sir.

Q. And you were always the spokesman?

A. Yes, sir.

Q. Now, Mr. Cool, did Mr. Willett ever have occasion to praise your work?

A. I never heard him praise it. [118]

Q. Did he ever offer you better jobs, or advancement, or increases in pay?

A. Yes, he offered me a better job.

Q. What job did he offer you?

A. One time he offered me a boat job.

Q. How much does that pay more than a boom man's job? A. A dollar a day more.

Q. When did he offer you the job as boatman?

A. About three months before I left the in-

(Testimony of Robert Irwin Cool.)

dustry—before I left up there—three or four months.

Q. Three or four months before you left, you say? A. Yes, sir.

Q. What other jobs did he offer you?

A. Well, he didn't actually offer me it, but he did talk about making me a head rafter.

Q. When did that occur?

A. About six months before I left the industry.

Q. That would be six months before December, 1947? A. Yes, sir. [119]

Trial Examiner Plost: Was this after you had this log jam that we were talking about a while ago?

The Witness: Yes, sir.

Trial Examiner Plost: Afterwards?

The Witness: Yes, sir.

Trial Examiner Plost: All right.

Q. (By Mr. Merrick): Why didn't you seek the job of head rafter?

A. I beg your pardon?

Q. Why didn't you seek the job of head rafter?

A. Well, because I figured that there were other men older than I was there that were entitled to it.

Q. From the standpoint of seniority?

A. That is right. And the same way with the boat job.

Q. And you say you left in December, 1947?

A. Yes, sir.

Q. What were the circumstances under which you left? [120]

(Testimony of Robert Irwin Cool.)

A. I quit to go into business for myself.

Q. During the time that you worked on the boom what were your personal relations with Mr. Hedrick?

* * *

A. Just as an ordinary outside individual would be, we were friendly.

Q. Then the only trouble seemed to arise over this job steward's job? A. That is right.

Q. How long were you in the cleaning business—you say four months?

A. Oh, three or four months.

Q. And then what happened after you got out of the cleaning business?

A. Then I applied for a job to Mr. Hedrick.

Q. How did you make that application?

A. By phone call.

Q. When did that application take place?

A. In June.

Q. In June of 1948? [121] A. Yes, sir.

Q. What was the conversation over the phone with Mr. Hedrick?

A. I just merely asked him if he had any work available and he said, "Not right now, Bob, I haven't, because," he says, "the high water is on and everything is down." And I admitted that that was right. And I asked him—I says, "If anything arises, give me a phone call," and I gave him my phone number and he said that if anything came up he would give me a call.

Q. And that was the end of the conversation?

A. Yes, sir.

(Testimony of Robert Irwin Cool.)

Q. After that, in September, did you have occasion to talk to Mr. Willett about a job?

A. Yes, sir.

Q. What were the circumstances concerning that conversation?

A. He told me that there was a job available at the Leadbetter Logging Company, and I told him that I was available for it.

Q. And you had reference to your application that you had made before?

A. Yes sir.

Q. At that time were you working?

A. Yes, at the Shaver Transportation Company.

Q. Was there any particular reason why you wanted to work at Leadbetter?

A. Yes there was, because it was much shorter to my home. I only had six miles to drive, whereas I had between 16 and 18 to drive [122] down to Shaver's.

Q. Did you have a temporary or full time job at Shaver's? A. A temporary job, yes.

Q. Are you still willing and available to work?

A. Yes, sir.

Q. Now, generally, what were your relations with the rest of the boys? How did you get along with the rest of the boys?

A. Very fine as far as I am concerned.

Q. Did you hear Mr. Hedrick testify about a Mr. Herlihy? A. Yes, sir.

Q. Do you know why Mr. Herlihy quit?

A. No.

(Testimony of Robert Irwin Cool.)

Q. How had you gotten along with Mr. Herlihy?

A. Very fine.

Q. Where did he work on the boom? What was his job? A. He was a rafter.

Q. Did he work with you? A. Yes, sir.

Q. At that time did Mr. Hedrick make any protest as to the manner in which you were handling grievances? A. Not as I know of.

Q. Do you know if he made any protest to anyone? A. Not as I know of.

Q. Do you know if the position of boom man is considered hazardous in the industry? [123]

A. I would say so.

Q. What are the hazards connected with that particular type of work?

A. Well, the hazards, especially in swift water, anybody can fall off a log and go into the river and be sucked underneath the raft. Or anybody might get a load dropped on him from the unloading crew. [124]

* * *

Mr. Tremaine: In view of the Examiner's previous statement I would like the record to show that the Company is not making any contention that Mr. Cool was incompetent in the performance of his own functions as a boom man. [125]

* * *

Cross-Examination

By Mr. Babcock:

Q. There is one thing I want to ask you, Mr. Cool, which I am not sure was cleared up before.

(Testimony of Robert Irwin Cool.)

In [126] connection with this dispute about the seniority of these two men, it was a case where one was hired first and the other was put to work first, is that right? A. Yes.

Q. Were those men both Union men?

A. No. Mr. Olson was not.

Q. And which one was it that Mr. Hedrick wanted to give the greater seniority to?

A. Mr. Olson. [127]

* * *

Cross-Examination

By Mr. Tremaine:

Q. Mr. Cool, did you ever have occasion to take a grievance past the stage of conference with Mr. Hedrick? A. No sir.

Q. Apparently then you were satisfied with the way that your conference came out on the seniority matter of Buehl Patterson and Olson?

A. Yes, sir.

Q. On this occasion when you left the boom and I believe you stated you were not sure whether you asked Mr. Hedrick or not that you could go, did you say that the logs were all rafted at the time that you left? A. Yes, sir.

Q. And I believe you said that when you came back you said something about having men off the job?

A. When he told me about my leaving the job and not saying anything to him, then is when I told him that he was stepping out of line by taking these men off this job to move this boathouse.

(Testimony of Robert Irwin Cool.)

Q. And it is a fact then that Mr. Hedrick offered these men work on the boathouse when there was no work to be done on the boom?

A. Apparently he did. I wasn't there when he did it, but my [133] assumption was that he was stepping out of line, because when he took the men off the job they were not on state insurance; and if any man got hurt on this moving the boathouse job, the state was not liable for their injuries.

Q. That was your opinion?

A. That was the Court's opinion.

Q. Do you know whether Mr. Hedrick ordered the men to do that work, or whether he offered it to them to do this job?

A. That is what he said here, that he offered it to them and that he agreed to pay them \$5 apiece for doing the work, but he has never paid them that yet.

Q. Who were those men that you say were not paid that \$5 each? [134]

* * *

A. Bill Salsbury.

Q. Was there anybody else that was engaged on that job of moving the boathouse besides him?

A. Well, I don't know. There was half of the crew gone when I came down. There was half of them gone when they claimed that he was moving this boathouse.

Q. So you do not know whether half of the crew or not was involved in moving this boathouse, do you?

(Testimony of Robert Irwin Cool.)

A. According to what they told me when I came down on the job, half of them were away moving the boathouse.

* * *

ED MAHER

called as a witness on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Merrick:

Q. What is your name?

A. Ed Maher. [135]

Q. And what is your address?

A. Oswego, Oregon, General Delivery.

Q. And what is your occupation?

A. Boom man.

Q. Where are you employed?

A. At the Leadbetter Lumber Company at the present time.

* * *

Q. (By Mr. Merrick): How long have you been employed by Leadbetter, Ed?

A. Between two and three years, since they took over.

Q. In other words, you have been with them ever since they took over? A. Yes, sir.

Q. Did you work at that boom prior to taking it over?

A. I went to work there in 1941, in July.

Q. And you have been there ever since?

A. Yes, sir.

(Testimony of Ed Maher.)

Q. And during that time what jobs have you held there?

A. Well, I done the unloading, pulling lines, and rafting; and I have worked in the pocket, and done all work which is connected with general boom work. [136]

* * *

Q. Prior to working there did you ever work as a boom man? A. Oh, yes.

Q. How long have you been a boom man?

A. Oh, I have worked on the booms on and off and in the woods for the last 40 years or better.

Q. And now, did you work with Bob Cool at Leadbetter? A. Yes, sir.

Q. Did you have an opportunity to observe him as a workman?

A. I worked with him on a raft practically all the time.

Q. How did you find him as a workman?

A. He was a good, experienced boom man.

Q. He knew his job, did he? A. Yes.

Q. How did he do his work?

A. He done his work in first class shape.

Q. While you were there did you hear any complaints as to his ability or as to the way in which he did his work?

A. Absolutely not, not from any man on that job.

Q. How did he get along with the crew?

A. He got along with the crew in his job as a very reasonable man. He was a very reasonable man

(Testimony of Ed Maher.)

to get along with; a very militant man. [137]

* * *

Q. How was he as job steward. Was he a militant man?

A. He was a very militant man as job steward, and he would give it and take it.

Q. Did you ever hear any complaint as to how he handled his job as job steward?

A. The only complaint that I heard when he handled the job as job steward was from Hedrick—when he first handled the job as job steward.

Q. And what did Hedrick say in regard to that?

A. He said that the job would get along better without a job steward, and so would the Union, and the job would get along better if it was not a Union job.

Trial Examiner Plost: Now, when was this?

The Witness: That was around any time from about 1944 up until the last year.

Trial Examiner Plost: You mean that he said it more than once?

The Witness: Yes, more than once. [138]

* * *

Trial Examiner Plost: That is a matter of between four and five years. Would you say that it was at least four or five times in those four or five years?

The Witness: A couple of dozen times.

Trial Examiner Plost: A couple of dozen times?

The Witness: Yes, sir.

Trial Examiner Plost: Within that period?

The Witness: Yes, sir.

(Testimony of Ed Maher.)

Q. (By Mr. Merrick): Were you a job steward on this operation? A. Yes.

Q. When were you job steward?

A. I was job steward, I guess, from about 1943 until 1946, when I think Bob took over as job steward.

Q. You were job steward until the time that Bob Cool took over? A. Yes, sir.

Q. Are you job steward now?

A. Yes, sir.

Q. When did you take over the job of job steward again?

A. A year ago in September.

Q. How did you get along with Mr. Hedrick when you were job steward?

A. Well, there were different disagreements. It was continual—a continual thing, anywhere from two to three times a day sometimes, especially on the pike pole which he used, [139] and he would use very vulgar language when you would tell him to lay it down.

Q. How often would you have an argument with him over the pike pole?

A. It would run a couple of times a day sometimes, and then it would run on for a day or two when we would not have any argument on it, and then there would be a couple of times during a day, or two or three times a day when we would have an argument on it.

Q. Were you familiar with the grievances that they had when Bob Cool was job steward?

(Testimony of Ed Maher.)

A. Yes, I was.

Q. Were there more grievances then, when Cool took the job of job steward, or less?

A. I would say that when Cool took the job of job steward it cooled down considerably. There was not as many of them. Bob didn't have near as many run-ins as I did.

Q. How is it now?

A. Now it is running along pretty peaceably.

Q. Now, regarding the grievances that Mr. Cool processed, was the proper grievance procedure followed throughout?

A. Absolutely, yes.

Q. Generally how did he handle grievances, do you know?

A. He handled the grievances with the committee or somebody out of the crew. [104]

Q. And how did you handle them when you were the job steward?

A. I handled them either with the committee or some one of the crew. It would be either the business agent, or whoever it happened to be.

* * *

Q. You were present during Mr. Cool's testimony, weren't you?

A. I was.

Q. Did you hear his testimony regarding the argument that he had with Hedrick over the placing of the log in the boom?

A. I did, yes.

Q. What did Mr. Hedrick say to you on that occasion?

(Testimony of Ed Maher.)

A. Well, when the argument was over in regard to the log Hedrick says to me, "Ed," he says, "Who is right and who is wrong?" And I said, "What do you mean?" And he says, "I mean over putting that log in." And I said, "God damn you, 'Pan,' you know who is right. Cool was absolutely right. There was no way for a mistake." And so then he shut up and walked off.

Q. And that was the end of it?

A. That was the end of it as far as I was concerned.

Q. Did you hear the testimony in regard to the oral agreement on maintenance work and production work—regarding the number of loads that would be handled without any maintenance work being done? [141]

A. Yes.

Q. Will you state how many loads you were supposed to put in in a case like that?

A. There was supposed to be around 50 loads, and there would be no more of this bull cooking and working on skids and things like that.

Q. That is, if you put in 50 loads then you would not have to do maintenance work?

A. Yes, sir. That was the size of it.

Q. Is that the procedure that is followed today?

A. Well, yes, to a certain extent.

Q. Was it in effect prior to this grievance that Mr. Cool had with Mr. Hedrick over this skid?

A. Yes.

Q. How long had it been in effect?

(Testimony of Ed Maher.)

A. It had been in effect for a year or two. It was past practice for quite a while.

Q. Were you a member of the grievance committee that took Cool's trouble up with management?

A. Yes.

Q. Was Mr. Hedrick present at any of those meetings that you sat in on?

A. Yes, he was.

Q. Did he give any reasons why he would not hire Mr. Cool?

A. Well, at the first time he said that he was an incompetent [142] man and he was not responsible for his work. That was about the most expression that he made on it.

Q. And what happened next?

A. At the next meeting he appeared to be changed then and he was different.

Q. What did he say?

A. Well, he said that he was a competent man, and he knew that he was an experienced man.

* * *

Q. (Interposing): Mr. Maher, are you familiar with the man who was hired for this job, Mr. Fromong?

A. I never met the man, only on one occasion, and that was on that picnic, until he went to work. I met him through some friends at the picnic.

Q. Have you had any opportunity to observe him at the boom or on the operation?

A. Yes. He worked on the hill and he was down on the raft half a dozen times, maybe.

(Testimony of Ed Maher.)

Q. Generally what type of work does he do out there? A. The most that he done was unloading.

Q. Would that account for most of his work, unloading?

A. Well, yes. That was the biggest part of it. Of course [143] once in a while he was sent down on the boom.

Q. Have you heard any comments by Mr. Kerry or by Mr. Hedrick as to the ability or experience of Mr. Fromong?

A. Well, at the time of the last run we had, Mr. Kerry himself admitted that he was an inexperienced man for the boom, but he was used on the hill.

Q. When did that take place?

A. A week ago last Friday.

Q. A week ago last Friday? A. Yes, sir.

Q. That would be October 7th?

A. Yes. Wasn't that when the layoff was?

Q. I guess so. What fixes this event in your mind?

A. Well, it was because the layoff came on Friday, that they were laying the crew off and they cut the men down from 12 to 7. And he was one of the men laid off. [144]

* * *

Cross-Examination

By Mr. Babcock:

Q. Mr. Maher, did you meet with the Company

(Testimony of Ed Maher.)

about the Company's refusal to hire a crew on two occasions or just one?

A. You mean on the committee?

Q. Yes.

A. I was at all three meetings; one with the foreman, and then with the superintendent, and then with the job committee with the Company.

Q. What is the superintendent's name?

A. Mr. Kerry.

Q. And when you say the job committee with the Company, you mean Mr. Sullivan?

A. Mr. Sullivan, yes.

Q. And whom else?

A. There was Sullivan, Kerry and "Pan."

Q. And now, you stated at the first meeting he said that Cool was incompetent, is that correct?

A. That is correct.

Q. Now, what reason, if any did he give at the subsequent [145] meetings for not hiring Cool?

A. Well, he didn't come right out and give any exact reason, only that he said that either he or Bob—well, that the two of them could not stay on the same job.

* * *

Cross-Examination

By Mr. Tremaine:

Q. You said that you were job steward on this job between 1943 and 1946? A. Yes, sir.

Q. And you said that all during this time Mr. Hedrick kept making remarks about the Union,

(Testimony of Ed Maher.)

and that the job would be better without the Union? A. That is correct.

Q. And that started at the very time that you first became job steward?

A. Not from the time that I was first job steward.

Q. When did that start?

A. That started in 1944, when he got to be foreman.

* * *

Q. Did you ever have any occasion, Mr. Maher, to take a grievance up through the grievance procedure from Mr. Hedrick, or were you able to settle all your grievances with Mr. Hedrick [146] during this time?

A. No. On several occasions we had to take it on up to Mr. Kerry.

Q. And when was that?

A. The dates—I cannot give you the dates on it, but it was from 1944 until in 1946, when I resigned from the job of job steward. [147]

* * *

Redirect Examination

By Mr. Merrick:

Q. Mr. Maher, you were working for Leadbetter in December, 1946, when Mr. Cool started to work there again, were you? A. Yes, sir.

Q. Did you ever hear Mr. Hedrick make any remarks about Cool as a workman at that time?

A. The only thing was that the day that Bob was hired he came down on the boom and he says,

(Testimony of Ed Maher.)

“We have hired a new man”—he says—“One of the best men on the river,” he says. [156] And he says, “Can you guess who it is?” And I said, “I have got a pretty good idea, because I just saw Bob up there.” And he said, “That is who we have hired, one of the best boom men on the river.”

Trial Examiner Plost: This was when—back in 1944?

The Witness: Back in 1946—along in there.

Trial Examiner Plost: 1946?

The Witness: Yes, sir.

Q. (By Mr. Merrick): That was when Cool started back to work?

A. With the Leadbetter Company—yes.

Q. I believe you testified yesterday on cross-examination that on certain occasions you do maintenance work when the daily production work is being done? A. Yes.

Q. And now, on what occasions would you do maintenance work? Such as removing the skid, when production work was going on?

A. That is when we have a small amount of loads in the morning, and then we work for a while in the afternoon on that.

Q. If you had a heavy work load that day, would any skids be changed? A. No.

Q. Would that be in accordance with the past practice that you have referred to?

A. It would. It would be in accordance with the past practice which we have worked under. [157]

WILLIAM J. SALSBERY

called as a witness on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Merrick:

Q. Will you state your name?

A. William J. Salsbery.

Q. Mr. Salsbery, what is your address?

A. Oak Grove, Box 352.

* * *

Q. What is your occupation, Mr. Salsbery?

A. Boom man. [158]

* * *

Q. Where are you employed?

A. At the Leadbetter Logging Company.

Q. You are employed at the boom at Oswego?

A. Yes, sir.

Q. How long have you been employed at that boom?

A. Twenty-two years.

* * *

Q. In point of seniority are you the oldest employee there?

A. Yes, sir.

Q. Now, what jobs have you held in the 22 years that you have been at the Oswego boom?

A. I have done all the jobs that there have been on it.

Q. Well, what jobs have you done? Have you held all of them?

A. I have held all of them now. I am a boat operator now.

* * *

(Testimony of William J. Salsbery.)

Q. You were employed there when Bob Cool was working on the boom, were you?

A. Yes, sir.

Q. What was your job?

A. Head rafter. [159]

Q. What was the duty of the head rafter?

A. Just to give orders to the men on the rafts.

Q. Did you have Mr. Cool working under you?

A. Yes.

Q. Did you have an opportunity to observe him as a workman? A. Yes.

Q. How did you find him?

A. A good workman.

* * *

Q. How did he get along with the other men?

A. Good.

Q. Did you ever have any complaints from the other men relative to his work? A. No, sir.

Q. Now, in your duties as head rafter were you with Mr. Cool most of the working day?

A. Yes, most of the working day.

Q. How often would the superintendent be down on the boom—referring to Mr. Hedrick—the foreman, rather? A. Once or twice a day.

Q. In other words, you would have a better opportunity to observe Mr. Cool than Mr. Hedrick would? A. Yes, sir.

Q. How did you get along with Mr. Cool personally? [160] A. All right.

Q. Are you familiar with any of the grievances that Mr. Cool processed? A. A few.

(Testimony of William J. Salsbery.)

Q. Generally what grievances did you notice that he took up with management?

A. About the pike pole.

Q. What do you mean by that?

A. He was working on the river, and he should not.

Q. Who was working on the river?

A. Mr. Hedrick.

* * *

Q. If any complaints were made to you about Mr. Cool's work would they be made to you as head rafter? A. Yes, sir.

Q. Did you ever have any complaints as to Mr. Cool? [161]

* * *

A. No, I did not.

Q. Any type of complaint? A. No. [162]

* * *

Questions by Trial Examiner Plost

* * *

Q. I want to direct your attention to the testimony of both of these witnesses relating to an incident in which Mr. Cool ordered Mr. Hedrick off a raft, at a time when Hedrick was helping to put the logs into the raft—he ordered Hedrick off the raft. Do you remember the testimony?

A. I remember that, yes.

* * *

Q. But do you remember when it happened?

A. Yes.

Q. Can you tell me about when it happened?

(Testimony of William J. Salsbery.)

Can you tell me the date when it happened—I do not mean the exact date, but the time of the year?

A. It was in the swift water time. [164]

* * *

Q. That would be in the fall?

A. In the winter.

Q. In the winter? A. Yes, sir.

Q. Would it be after November or in December?

A. That would be in November, or December, or January. Somewhere in there.

Q. It would be in November or December of 1947? A. Yes, sir. [165]

* * *

LeROY SAULSBURY

called as a witness on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Merrick:

Q. What is your name?

A. LeRoy Saulsbury.

Q. You are no relation to Bill Salsbery, are you? A. No, sir.

Q. What is your address, Mr. Saulsbury?

A. 506 Second Avenue, Oregon City, Oregon.

Q. What is your occupation?

A. Boom man.

Q. Where are you employed?

(Testimony of LeRoy Saulsbury.)

A. At the Leadbetter Logging & Lumber Company at Oswego.

Q. How long have you been employed at the Oswego boom? A. About three years.

Q. What did you do prior to that?

A. I was in the Merchant Marine. [167]

* * *

Q. What jobs have you held with Leadbetter?

A. I have unloaded logs on the hill, and I have worked on the rafts.

Q. What job are you engaged in now?

A. Rafting.

Q. Were you employed at Leadbetter while Mr. Cool was there? A. Yes, I was.

Q. Did you have an opportunity to work with Mr. Cool? A. Yes, I did.

Q. How did he get along with the other men?

A. He got along very fine with the other crew—with the other members of the crew.

Q. How did you get along with him?

A. Very good.

Q. Did you have an opportunity to observe him as a workman? A. Yes, I did.

Q. How did you find him?

A. From my knowledge of working in the boom I thought that Bob Cool was a very good man.

Q. Did you ever hear any complaints from the crew about him?

A. Not from the crew members, no.

Q. Did you ever hear any complaints from Mr. Hedrick about him? A. Yes, sir. [168]

(Testimony of LeRoy Saulsbury.)

Q. What were the complaints that you heard from Mr. Hedrick?

A. In his capacity of job steward especially when I was doing some work on the hill. One incident comes to mind. We were putting in a pipe up there that the bulldozer had broken. Mr. Hedrick asked me to go over and help him, and so I did. And he says, "I suppose Bob will come up here now and try to stop us from doing this work. If he does, he is going to get fired, if he does not watch out." And I said, "Well, I do not think that you will have to worry about that, because I do not think Bob is going to come up here and stop such work as this when it actually has to be done."

Q. When did that occur?

A. That occurred in 1947, I believe.

Q. What time of the year, do you recall?

A. I believe it was in the spring of the year. It was when they were putting in the new track there. I don't know just exactly what the date was on that. It was around 1947.

Q. Well, were you on the grievance committee?

A. Yes.

Q. With Mr. Cool? A. Yes, I was.

Q. Who else was on that committee?

A. Ernie Brazeau.

Q. Was Mr. Cool always the spokesman when he took up grievances with Mr. Hedrick? [169]

A. Yes, sir.

Q. Do you recall any of those grievances that he took up with him?

(Testimony of LeRoy Saulsbury.)

A. I recall when Bob and Ernie came upon the hill and told "Pan" to put the skid back down.

Q. I think we have got all of that. Did you take part in this grievance on seniority involving Buehl Patterson and Mr. Olson?

A. At that time I was working on the hill, and the grievance came up down on the river, and Mr. Hedrick went down to the bunk shack and discussed it, and he came up on the hill, and he had a brake rod with him, and he was discussing something about it, and he asked me something or other about it, and I don't know just what was said about it, and, as I say, he had his brake rod in his hand and he said, "Cock suckin', fuckin' Union," and he threw his brake rod down, like that (indicating).

Q. It was after the discussion about seniority, was it?

A. Yes, concerning Patterson and Olson.

Q. Are you on the committee now?

A. Yes.

Q. Generally how does that grievance committee work out?

A. Well, when a beef arises amongst the crew and management—one in which management usually always is involved—the committee and the job steward usually go up and talk to Mr. Hedrick, and one is always the spokesman. Most generally it [107] is the job steward. Of course sometimes someone else was appointed as a spokesman. And

(Testimony of LeRoy Saulsbury.)

if the beef is not threshed out through the foreman, then it is taken up with Mr. Kerry, and if it is not threshed out then, it is taken up with the job committee with Mr. Kerry and Mr. Sullivan.

Q. Are you handling the grievances the same way now as when Mr. Cool was job steward?

A. Yes, sir.

Q. And in the same way now as when Ed Maher was job steward, before Cool? A. Oh, yes.

Q. No difference? A. No difference, no.

Q. While you were on the grievance committee with Bob Cool, did you ever hear any complaint as to how grievances were being handled by any member of the crew?

A. No. No, I never heard anything like that.

Q. Well, if any were made would you have heard it, do you think?

A. I probably would have—being as I was one of the committee I suppose I would have heard it more than likely. [171]

* * *

Cross-Examination

By Mr. Tremaine:

Q. Mr. Saulsbury, do I understand you to say that you always accompanied Cool when grievances were taken up with Mr. Hedrick? A. Yes.

Q. I think you said that at the time when Cool ordered "Pan" to drop the skid you were not on it?

A. No. I was on the hill. Mr. Brazeau and Mr. Cool, as they came up the hill to tell "Pan"

(Testimony of LeRoy Saulsbury.)

to get the skid back in, I was standing to the side where they were unloading the logs, or had been.

Q. Now, Mr. Saulsbury, getting back to this pipe occurrence, I think you said on direct examination that Mr. Cool never ordered work to be stopped when it was necessary work?

A. Cool didn't order it to be stopped. [172]

* * *

ROY T. HEDRICK

recalled as a witness on behalf of the Respondent, having been previously sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Tremaine:

Q. State your full name, please.

A. Roy T. Hedrick. [175]

Q. And your address?

A. 455 Ninth Street, Oswego, Oregon.

Q. What is your present position with the Company?

A. Foreman of the Leadbetter Logging Company at Oswego—at the boom at Oswego.

* * *

Q. When did you join the Union, Mr. Hedrick?

A. In 1937.

Q. And how long were you in the Union?

A. Up until 1944.

Q. And when I say, "the Union," I mean the Union involved in this hearing. [176]

(Testimony of Roy T. Hedrick.)

A. That is right.

Q. The IWA? A. Yes, sir.

Q. And the same Local? A. That is right.

Q. What various positions have you held in that local Union, Mr. Hedrick?

A. I acted as shop steward on the job, or job steward, as they call it, and I was Secretary—Recording Secretary of the Union in 1943 and 1944—that is, part of 1943 up until I got my withdrawal in 1944.

Q. Did you partake in any other activities of the Union? A. I did.

Q. In what, for instance?

A. I was elected to go to one of their conventions at Vancouver, B. C., as a delegate.

Q. And other activities, Mr. Hedrick?

A. Yes. I was spokesman for the group at one time.

Q. When was that, about?

A. I believe it was when I was shop steward. I cannot say just when it was, but I know that I was elected spokesman for the group. [177]

* * *

Q. And in this particular instance concerning Mr. Cool, did you go to Mr. Willett and ask for a man? A. I did.

Q. And what did he say?

A. He said that he had Mr. Cool available. And I asked him if he had a man available for work, and Mr. Cool was the only one that he pointed out to me that was available at that time.

(Testimony of Roy T. Hedrick.)

Q. And what did you do then?

A. I told him that I didn't want him [181]

* * *

Trial Examiner Plost: At these times when you hired these eight non-Union men, had you first in each instance requested the Union to furnish you with a Union man?

The Witness: When these men were hired, men were very scarce. We could not get them. We had a standing order in with the Union for the men at that time when most of them were hired.

Trial Examiner Plost: But in each individual case did you first ask the Union specifically to give you a man?

The Witness: I think I did, yes—I think there was something said to them in each case.

Trial Examiner Plost: And in each case they told you that they did not have a man?

The Witness: That is right.

* * *

Trial Examiner Plost: And that is the custom, is it, that you ordinarily follow?

The Witness: That is the custom that we follow. [185]

* * *

Trial Examiner Plost: Fromong was hired as a boom man?

The Witness: That is right.

* * *

Q. (By Mr. Tremaine): Has there ever been

(Testimony of Roy T. Hedrick.)

any occasion when he worked on the raft, Mr. Hedrick?

A. Yes, I think that he has been down there three or four times. When they were unloading, we usually finished unloading an hour or so ahead of the rafters, and I think that he has been down there and helped them out. [188]

* * *

Q. Have you ever re-hired any men who had once quit working at the Oswego boom?

A. Yes, sir.

Q. Who were they?

A. Ernest Brazeau and Buehl Patterson.

Q. Mr. Brazeau, prior to the time that he had quit, had he been active on Union matters?

A. He was. He was a committee man.

Q. And was Buehl Patterson prior to the time that he quit active in Union matters?

* * *

A. Yes, he was. [190]

* * *

Q. (By Mr. Tremaine): Now, Mr. Hedrick, why did you refuse to hire Cool?

A. For overstepping—insubordination and overstepping his authority as a job steward.

Q. And now, when you say, “insubordination,” what instance specifically are you referring to?

A. Well, for one thing a work stoppage.

Q. That was on the rollway?

A. That was on the rollway, and then we had another stoppage or two.

(Testimony of Roy T. Hedrick.)

Q. What was that stoppage or those stoppages?

A. One stoppage was for handling steel. In each one of these instances the men I asked to do this work were perfectly willing to come and do it. The men themselves that were asked to do it were perfectly willing to come and do it. And in this other instance, other than the rollway, we had some steel or railroad iron to move, and I had taken two men to move it, and at that time, and the only time that Cool was ever accompanied by a committee man, he was accompanied at that time by a committee man,—by one man.

Q. Will you tell us what that incident was?

A. I had two men working on that steel and Cool and this other man came up and started to saunter around—messaging around—and I walked over to them and told them that I [192] expected them to do the work that was left down on the river to be done, and that these two men were going to pull up the steel and take care of it. And right away there was an argument started, and he says, “Well, if you are going to shoot off your big mouth, we just won’t do it.” So those two men still stayed there working, and this committeeman and Cool went back. And I sent the men back off the job. I told them not to shove their necks out so that they would have any trouble with the Local. And that work was stopped at that time.

* * *

Q. (By Mr. Tremaine): About when was that, Mr. Hedrick, to [193] your best recollection?

(Testimony of Roy T. Hedrick.)

A. In July of 1947.

Trial Examiner Plost: And when did Cool quit.

The Witness: In December of 1947.

Trial Examiner Plost: About six months before he quit?

The Witness: That is right.

* * *

Q. And now, going back to the incident of the rollway, will you briefly tell us about that?

A. Yes. We were working on the rollway and I asked one man—I think there was only one man that I took off the raft at that time, and I left eleven, I think, down there, and I asked this one man to come up and assist LeRoy Saulsbury, and I do not remember who the other man was, in taking out skids to get ready to start working our rollway.

* * *

Q. (By Mr. Tremaine): Why was it necessary to take out the skid?

A. It needed repair, and at that time we were getting quite a few logs, and I had to do that work when I had time to do it. [194] We had been putting it off and putting it off, and there was no use putting it off and putting it off until the whole thing gave way and the whole rollway went to pieces.

Q. Did you consider that maintenance work?

A. I did.

* * *

Q. (By Mr. Tremaine): About when was this to your best recollection?

(Testimony of Roy T. Hedrick.)

A. I think it was in June—I suppose along in May or June.

Trial Examiner Plost: Of what year?

The Witness: 1947.

Trial Examiner Plost: That would also be about seven or eight months——

The Witness (Interposing): That is right.

Trial Examiner Plost: Before Cool quit?

The Witness: That is right.

Trial Examiner Plost: Is that right?

The Witness: Yes, sir.

Trial Examiner Plost: And it would be within a month or so of the other incident? [195]

* * *

Q. Now, what arrangement had you made, Mr. Hedrick, for the delivery of more logs that day?

A. Well, I knew from previous days that we could not get any more logs before noon, and the way it turned out we didn't get any more until 2 o'clock in the afternoon.

Q. And what time was this that you began removing the skid?

A. About 9 o'clock in the morning after the loads had come in.

Q. Now, what happened—will you state that briefly?

A. Well, Mr. Cool came up and he said, "You are working out of turn on this rollway." Well, I thought that he meant that I was working the men that I had there too often on the rollway. One of them was Ed Maher. I always had him work on

(Testimony of Roy T. Hedrick.)

the rollway, and I thought that that is what he meant, and I told him that I figured on having the rest of the crew come up and help us out when they got through with their work down below; and he said, "By gosh, we are not doing that kind of work." And I said, "Why not. The contract says you should." And he says, "By gosh we are not doing that kind of work, and that is it," and he hollered to the engineer at that time to drop the skid back in the hole, and let it lay there, and I spoke to the engineer and told him to hold it; that I thought I had a little [196] authority there. And he did. He held it there until I went and phoned, and I was advised by one of my superiors to drop and put the skid back in. [197]

* * *

Q. (By Mr. Tremaine): One more question about that incident before we leave it. There was some reference made yesterday to the fact that there were several rafts of logs in the water at that time, and I think there was an inference that there was some work needed to be done on those several rafts of logs in the water at that time. Will you tell us about that, Mr. Hedrick?

A. There was not too much work to be done there, and I left eleven boom men on the raft to do the work.

Q. And when did they finish that work?

A. To my knowledge about 9:30 in the morning.

Q. And what did they do between 9:30 until 2, Mr. Hedrick?

(Testimony of Roy T. Hedrick.)

A. They sat in their bunkhouse.

Q. And now, Mr. Hedrick, had you in the past had maintenance work done the same day that you were unloading logs?

A. Yes, sir.

Q. Had you done it several times?

A. Yes, several times. In 1935 until 1944 we done it when we were asked to do it.

* * *

Q. You were here yesterday when you heard testimony to the effect that there was [198] an understanding about not doing maintenance work when a certain number of loads of logs had been delivered, and also that there had been a past practice about that?

A. Yes, sir.

Q. Would you care to tell us about that, Mr. Hedrick?

A. Yes. I started working there in 1935, and until about June or July, or whatever it was, or April, whenever the rollway work was stopped, I never heard of any past practice where maintenance work and boom work were not done the same day.

Q. Was there any understanding to that effect?

A. No, absolutely not.

* * *

Q. (Interposing): You mean that there was no practice that you could not unload any amount of loads of logs and not do maintenance work?

A. And not do maintenance work, because I could not see where the boom could function and go on functioning without doing maintenance work. If we had 100 loads of logs and our rollway went hay-

(Testimony of Roy T. Hedrick.)

wire, we would have to stop operations entirely and fix the rollway, which would probably take two or three days, and which would result in shutting everything down and closing the woods and the whole business, and we had to do this work as [199] the work went on, and there were plenty of men to do it. We hired plenty of men to do that work.

Q. Now, there was some testimony yesterday, as I recall, that the practice was that when the work was done the men could go home. Tell us about that.

A. Yes. From 1935 until 1944 we were required to stay on that job eight hours a day. I am speaking myself as a boom man at that time, and I know. We never were allowed to go away from that job, until Mr. Kerry took the job that he now holds. At that time he granted the men along with myself—I was with him, and I was instrumental in having it granted—at that time he granted the men the privilege of going home when their work was done, including boom work and maintenance work. That meant when their work was done for the day where we figured that they had done enough. There was never at that time anything said about any 35 or 45 loads being a day's work. There was nothing said about any amount of loads being a day's work for a man. And on that boom in particular weather conditions have a whole lot to do with your manpower. If you have swift water it takes more men to take care of the logs. If we have a north wind blowing upstream, hard against the men, it takes more men

(Testimony of Roy T. Hedrick.)

to handle the logs. If everything is working in favor of the men, they can do it, and do it much easier. Now, this one day—maybe I am getting off here somewhere, am I?

Q. That is all right. You just go ahead. [200]

A. This one incident of the log rollway, I put off for two days doing that work, because one day it was raining like hell, and the next day it was just hotter than hell, and I put it off, not to call these men up there to do that dirty work when there was that kind of weather, and then I was stopped when I tried to do it.

Trial Examiner Plost: Now, this arrangement that was made by Mr. Kerry, that the men could go home when their work was finished for the day, regardless of the time, was made some time in 1944, was it?

The Witness: Yes, sir.

Trial Examiner Plost: Thank you. And from 1944 on that has been the custom?

The Witness: That has been the custom. When their boom work—when their boom work and maintenance work is done——

Trial Examiner Plost: Since 1944 then they can go home?

The Witness: Yes, sir.

Trial Examiner Plost: Is that in the contract?

The Witness: No.

Trial Examiner Plost: It is just an agreement?

The Witness: That is right; just a verbal agreement.

(Testimony of Roy T. Hedrick.)

Trial Examiner Plost: Thank you. [201]

* * *

Q. (By Mr. Tremaine): Mr. Hedrick, when Mr. Maher was your job steward before Mr. Cool took over——

A. (Interposing): That is correct.

Q. He was job steward before Cool took over, was he? A. Yes.

Q. How were grievances processed then to you?

A. Well, we didn't have so many grievances at that time. About the only grievance that we had was my pushing a pike pole at that time, and that was about the only thing that we had a grievance about. They asked me for—oh, I guess that was during Cool's regime too, and the things that they asked me to do for them were granted if possible by me. If they were not, they could take them up further.

Q. And now, I am referring to what was the procedure followed when Mr. Maher was job steward in processing the grievances to you.

A. Well, he would come and meet with me, and part of the committee.

Q. Would he bring someone with him?

A. He usually would—yes. [203]

Q. Now, during the time that Mr. Cool was job steward did he bring a committee of men with him when he would present a grievance to you?

A. He never presented a grievance to me before any operation was stopped—on any one of those

(Testimony of Roy T. Hedrick.)

operations—there never was a grievance presented to me at all before any operation was stopped. It was just bang, right now, stop—stop doing it.

Q. Who has been job steward since Mr. Cool is no longer in the crew? A. Mr. Maher.

* * *

Q. Now, how would you characterize your relations with Mr. Maher and the Union since Mr. Cool has left?

A. I have not had any trouble that I can recall. [204]

* * *

Q. Will you explain to the Trial Examiner about your pushing a pike pole?

A. Yes. It is written in the contract that a foreman of a boom employing over five men, I believe, is not to push a pike pole, or do any boom work. But during the man shortage I was granted the right to push a pike pole until more men were available. And when I say, "pushing a pike pole," I mean rafting logs or getting the logs away from the bottom of the rollway and out of the pocket, and into the various rafts. [205]

* * *

The Witness: Yes.

Trial Examiner Plost: Well, then, the only time I remember in your testimony as to when he stopped the job was this incident relating to the rollway. He stopped the job on that occasion, did he?

The Witness: On that occasion, yes.

(Testimony of Roy T. Hedrick.)

Trial Examiner Plost: Now, on what other occasion did he stop the job? [207]

* * *

Q: (By Mr. Tremaine): Mr. Hedrick, did you have any other cause of dissatisfaction on the part of Cool?

A. He left the job once without permission and was gone about an hour and a half, and I saw him going.

* * *

Trial Examiner Plost: Was it along about the same time as these other two incidents?

The Witness: That is right. Just along in there somewhere—close. [208]

* * *

Q. (By Mr. Tremaine): Did you have any other cause for dissatisfaction with Cool?

A. Well, in this particular instance I asked Cool to come to the office with me and talk this thing over—the time that he had left the job—and he said, “Oh, hell, I won’t go any place with you.” So that was it. And I went to the office with the intention of discharging the man, and I thought I certainly had the right to do so, but you can cool off quite a bit in the distance that we had to go to the office—about half a block away. And I thought better of it when I got up there, and I thought that the man still had to live regardless of me or anybody else.

Trial Examiner Plost: So you did not fire him?

(Testimony of Roy T. Hedrick.)

The Witness: That is right. [209]

* * *

Q. (By Mr. Tremaine): Did you give any reason to Willett why you would not hire Cool when Willett told you that he had Cool available?

A. I do not believe right at that time—the first time I talked to him that I gave him a reason, but after the committee met I gave him the reason that I testified here—all the various things that I have pointed out here.

Q. Did you tell Willett that you thought that Cool was incompetent?

A. No. I told him that he could be competent if he wanted to be, but he had not been on our job—on our particular job. [211]

Q. Now, when you say, “competent,” Mr. Hedrick, do you mean that he was not able to perform his work?

A. No. I mean that the man was able to perform his work, but did not.

Q. Was able but did not?

A. That is right.

Q. Did you hear the testimony of Mr. Maher yesterday afternoon to the effect that you made certain statements against the Union?

A. Yes.

Q. Did you make those statements to Mr. Maher?

A. No, I did not.

Q. Have you ever made any such statements against the Union?

A. No, I have not. I have never made any statements against the Union to that effect.

(Testimony of Roy T. Hedrick.)

Q. Well, have you made any statements whatever against the Union?

A. Oh, I might have cussed them. I might have cussed every day, but then if I cussed them every day it is just any general language, but I have never made any malicious statements against the Union—no.

Trial Examiner Plost: Did you make the statement that it was either you who would quit or Cool would quit, or something to that effect?

The Witness: Well, it was not that either I would quit or [212] he would quit. I made the statement that Cool and I could not get along on the same job.

Trial Examiner Plost: Is that all; that you and he could not get along?

The Witness: That either one of us had to step out of it—either one or the other.

Trial Examiner Plost: One or the other could not work there?

The Witness: That is right.

Trial Examiner Plost: That was it?

The Witness: Something to that effect, anyway. [213]

* * *

Trial Examiner Plost: You may do so. Let the record show that the witness who was not present this morning at the time the General Counsel was ready to close his case has arrived, and by agreement of the parties he will now testify, as it is necessary for him to leave as soon as possible.

E. J. FROMONG

called as a witness on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Merrick:

Q. Will you state your name?

A. E. J. Fromong.

Q. And what is your address?

A. Willamette, Oregon.

Q. Where is Willamette located with reference to Oswego? A. About six miles up the river.

Q. And what is your present occupation?

A. I work—well, they call it Publishers Paper. It used to be Haley's. 218]

Q. Is that a pulp mill? A. Yes, sir.

Q. How long have you been there?

A. Just about a week now.

Q. Where were you employed prior to this?

A. At Leadbetter's.

Q. How did you happen to leave Leadbetter's?

A. I was laid off.

Q. Was that a mass layoff?

A. There were five of us laid off at the time.

Q. Out of how many men? A. Out of 12.

Q. Five out of 12? A. Yes, sir.

Q. And were you one of the five?

A. Yes, sir.

Q. When did you first go to work for Leadbetter?

A. Last year, in September.

(Testimony of E. J. Fromong.)

Q. How did you happen to be notified that there was a job there? A. Through Mr. Reynolds.

Q. He is a friend of yours? A. Yes, sir.

Q. And whom did you see when you reported for work? A. Mr. Hedrick. [219]

Q. Did you have a conversation with Mr. Hedrick? A. Not a great deal.

Q. Now, first, prior to going to work for Leadbetter, had you had any experience as a boom man?

A. Not rafting on boom sticks.

Q. What experience did you have?

A. On the upper river on a tow boat, and stuff like that.

Q. But you never had worked as a boom man?

A. No.

Q. When you went to see Mr. Hedrick, what was your conversation with Mr. Hedrick?

A. I asked if there was a job available, and there happened to be, so I went to work.

Q. Did he question you about your experience?

A. Yes, sir.

Q. What did he say?

A. He asked me if I ever worked on a boom and I said, "No."

Q. What job did he put you on?

A. Up on the hill.

Q. When you went to work did you have a pair of calked boots? A. No.

Q. Did Mr. Hedrick make any remarks about that? A. He advised me to get a pair.

Q. What did he say to you in that regard? [220]

(Testimony of E. J. Fromong.)

A. A man without a pair of calked boots is not much good.

Trial Examiner Plost: Let the record show that it is the Trial Examiner's understanding that loggers, meaning river men and raft men, and in this instance boom men, who work on timber which is floating in the water, wear a special kind of shoe which is called a calked shoe or boot, to which reference is being made in this testimony.

Q. (By Mr. Merrick): You were employed at the Leadbetter Logging & Lumber Company from September until about a week ago, when you were laid off?

A. Yes, sir.

Q. Generally what type of work did you perform during that period?

A. We were unloading.

Q. And during this time were you kept mainly on the hill?

A. Yes.

* * *

Cross-Examination

By Mr. Babcock:

Q. Mr. Fromong, before the time you went to work there and talked with Mr. Hedrick, had you ever talked to him before that time about a job? [221]

A. Yes, I believe once.

Q. Approximately when was that?

A. Probably about two or three weeks before.

ROY T. HEDRICK

recalled as a witness on behalf of the Respondent, having been previously sworn, was examined and testified as follows: [222]

* * *

Cross-Examination

By Mr. Merrick:

Q. When you hired Mr. Fromong—when you went to Mr. Willett prior to that, you asked Mr. Willett for a boom man, did you not?

A. I asked him if he had any boom men available.

Q. You wanted a boom man, didn't you?

A. I wanted an experienced man if I could get him—certainly.

Q. Now, when Mr. Fromong went to work for you you testified that that was a temporary job.

A. At that time I thought it was temporary—yes.

Q. But what happened actually?

A. Actually our logs picked up a little bit, and our man that [226] was hurt was not able to take his job back over, and he was not crowded in any way to do his full day's work, and while he did a damn good day's work, and he is still doing it, I did not feel that we should ask him or anyone to come up on the hill and take his place.

Q. Well, as to whether or not the job was temporary or permanent was not any reason why Cool was not hired? A. Well, no.

Q. That would not have anything to do with it?

(Testimony of Roy T. Hedrick.)

A. No. [227]

* * *

Q. (By Mr. Merrick): Now, Mr. Hedrick, I believe you testified that there were two prime reasons why you refused to hire Cool, is that correct?

A. Yes, sir.

Q. What were those reasons again?

A. Insubordination and overstepping his authority as a job steward.

Q. Now, of those two reasons which to your mind was the more important?

A. Insubordination.

Q. Now, under insubordination you listed as the prime reason this rollaway incident or the skid incident? A. That is right.

Q. And secondly the handling of steel?

A. That is right. [229]

* * *

Q. (By Mr. Merrick): Well, did you ever file a grievance against the Union under that contract?

A. No.

Q. Did you ever protest to the Union regarding the manner in which grievances were being processed? A. No. [230]

* * *

Q. And now, when the job steward would come to you relative to your pushing a pike pole, would all the men stop work on that occasion?

* * *

A. No, not on all the occasions. They might on

(Testimony of Roy T. Hedrick.)

one or two, or something like that. I don't remember. I do not believe the rest of them stopped working.

Q. Then you do not know that they did stop, is that correct?

A. That is right. I don't know that they stoppped, or whether [231] they kept working. I do not think that they stopped, to be honest with you.

Q. Are you certain of that?

A. There was not too much of an argument on that because I knew that I was violating our contract, and I would argue with them a little bit, maybe, but it didn't do me a hell of a lot of good.

Q. Now, I believe you testified that there was an incident when Maher was job steward, and the job was stopped—is that correct? There was one instance where the job was stopped. You testified to one incident where he was job steward and the job was stopped?

A. Yes. That was later. That was the last time that he was job steward.

* * *

Q. Well, why was he acting in his capacity as a job steward?

A. *Because* had first consulted the crew and the active committee.

Q. And is it your testimony that Cool did not discuss it with the committee? [232]

A. Absolutely.

(Testimony of Roy T. Hedrick.)

Q. Does that apply to the skid incident?

A. Yes, sir.

Q. And also to the steel incident?

A. I would not state that as to the steel incident, because there were two men—one committee man and Cool that came up on the steel incident. [233]

* * *

Q. You heard LeRoy Saulsbury testify, did you not? A. Yes.

Q. Do you recall making those statements about the Union that he testified to?

A. No, I don't.

Q. Do you think that you could have made them?

A. It is possible. I am quite a hand at swearing. I am good at it. [235]

* * *

Cross-Examination

By Mr. Babcock:

Q. One thing is not clear to me, Mr. Hedrick, and that is with respect to the practice or lack of practice in doing maintenance work on days on which logs are handled. Now, as I understand your testimony since you were called as a witness last time, you stated that you knew of no practice from 1935 to 1944.

A. To 1947 I think I said, didn't I?

Q. Well, I think you said 1944. Did you mean to 1947? A. From 1935 until 1947.

(Testimony of Roy T. Hedrick.)

Q. From 1935 until 1947? A. Yes, sir.

Q. There was no practice under which maintenance work was not done when there was a busy day on boom work? A. That is right.

Q. Then I understood you to say after that that so far as you were concerned there was no practice after that? A. That is right.

Q. Now, I believe you testified yesterday that at the time of this incident with respect to the skid, in 1947, approximately in June, an agreement was reached that on days on which a certain number of loads were handled, there would be no maintenance work? [237] A. Not prior to that.

Q. No. I say after that incident.

A. After that I think there was an agreement, but not reached between me and the Local. I was speaking for myself now.

Q. You did not agree with that policy then?

A. Not fully—no.

* * *

Q. And Cool was the man who started the incident according to your testimony?

A. Yes, sir, that is right.

Q. Now, there was one other thing that was not clear to me, and that was the policy with respect to the men going home after the completion of a day's work, which you said was instituted by Mr. Kerry, I believe? A. That is right.

Q. What determines when they have completed a day's work?

(Testimony of Roy T. Hedrick.)

A. When we have nothing else for them to do after their logs are unloaded, we tell them, or they automatically go home now, but if there is something else for them to do—maintenance work—we still maintain that they should stay there and do it, [238] and work the full eight hours.

Q. That would be only in the event that they had not already handled the number of cars or loads, 50, or whatever it was, that was agreed upon, isn't that it?

A. No. There was no such event.

Q. Then I do not understand the agreement.

A. What agreement?

Q. The agreement with respect to not doing maintenance work on days on which the men were handling 50 loads or more.

A. I told you that I had nothing to do with that.

Q. But that was the agreement, wasn't it?

A. That was possibly the agreement at one time. I know nothing of it. I had nothing to do with it at all, and as far as that agreement and I are concerned, it is out of the window.

Q. Oh, I see. So that as far as you are concerned if there was maintenance work that you thought should be done, and if the men had unloaded, or were going to have to unload more than 50 cars, so far as you were concerned, they would have to go ahead and do the maintenance work anyhow?

A. That is right. If maintenance work is necessary work, I think it should be done.

(Testimony of Roy T. Hedrick.)

Q. And naturally you objected to Mr. Cool's objection to that procedure?

A. That is right. [239]

* * *

WALTER J. KERRY

recalled as a witness on behalf of the Respondent, having been previously sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Tremaine:

Q. What is your relationship with the Leadbetter Logging Company, Mr. Kerry?

A. Well, I supervise the operations of all booms and reloads and things of that kind, and the handling of logs for the Leadbetter Logging Company, the Columbia River Paper Mills, Oregon Pulp & Paper Company and the Willamette Shingle Company.

Q. In other words, your work is for all four companies? A. That is right.

Q. And you work for all these four companies indiscriminately, do you? A. Yes, sir.

Q. And is your pay adjusted for all four of the companies too? [241]

A. Yes, I understand it is.

Q. When did you come to the Oswego boom?

A. In August of 1944.

Q. And you came in as Manager?

A. Yes, sir.

(Testimony of Walter J. Kerry.)

Q. Under the Scott Rafting Company?

A. Under the Scott Rafting Company.

Q. It was then wholly owned by the RFC?

A. The Scott Rafting Company was wholly owned by the RFC at that time.

Q. And when there has been testimony here before that the RFC was running the boom, actually they are referring to the RFC running the boom through the Scott Rafting Company, is that right?

A. It was the Scott Rafting Company. I never worked for the RFC. I worked for the Scott Rafting Company. It was a separate institution. The RFC happened to own all the stock of the Scott Rafting Company.

Q. And you worked as Manager on that boom until when?

A. Until the Leadbetter Logging Company took it over.

Q. And when the Leadbetter Logging Company took over the boom, you took over that duty in connection with other duties?

A. I stayed there at the time, until the Leadbetter Logging Company took it over, and then I took it over for the Leadbetter Logging Company in conjunction with other duties around the [242] first of February, 1947. [243]

* * *

Q. How would you describe the relationships between the Company and this Union, in any way that you want to? I am asking you to describe those relationships.

(Testimony of Roy T. Hedrick.)

Q. And naturally you objected to Mr. Cool's objection to that procedure?

A. That is right. [239]

* * *

WALTER J. KERRY

recalled as a witness on behalf of the Respondent, having been previously sworn, was examined and testified as follows:

* * *

Direct Examination

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Q. In other words, your work is for all four companies? A. That is right.

Q. And you work for all these four companies indiscriminately, do you? A. Yes, sir.

Q. And is your pay adjusted for all four of the companies too? [241]

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Q. And you came in as Manager?

A. Yes, sir.

(Testimony of Walter J. Kerry.)

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Q. And when there has been testimony here before that the RFC was running the boom, actually they are referring to the RFC running the boom through the Scott Rafting Company, is that right?

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A. Until the Leadbetter Logging Company took it over.

Q. And when the Leadbetter Logging Company took over the boom, you took over that duty in connection with other duties?

A. I stayed there at the time, until the Leadbetter Logging Company took it over, and then I took it over for the Leadbetter Logging Company in conjunction with other duties around the [242] first of February, 1947. [243]

* * *

Q. How would you describe the relationships between the Company and this Union, in any way that you want to? I am asking you to describe those relationships.

(Testimony of Walter J. Kerry.)

A. From the standpoint of the Company we have cooperated with the Union, and we have always been willing to do anything that we can, and have always worked with the Union and tried to keep things going in a harmonious fashion. [244]

* * *

Q. (By Mr. Tremaine): Now, after Leadbetter took over, Mr. Kerry, what were the circumstances with respect to the Company's relationship to the contract on this boom?

A. You mean the agreement?

Q. Yes.

A. Well, we just ran along until such time as we could get together and negotiate a new contract.

Q. Did the Company continue under the policy of the Scott Rafting Company and the RFC of an informal agreement and that the mass policy in the area would control?

A. Yes. We just went along.

Q. Now, when was a contract finally negotiated to cover this boom? [247]

A. I believe it was signed some time in July of 1947.

Q. And was this contract similar to the contracts in existence in the area with reference to the other booms?

A. To my idea with just a few minor changes, yes.

Q. You mean after that time?

A. I guess it was the same as the others that were in effect in July of 1947. [248]

* * *

(Testimony of Walter J. Kerry.)

Cross-Examination

By Mr. Merrick:

Q. At the present time you are employed jointly by four employers, is that correct?

A. I am on the payroll of one, but I do work for all four.

Q. Is your time spent equally on all four of those companies' operations?

A. It varies tremendously. Sometimes for two or three weeks at a time I will be working with one outfit. [254]

* * *

Q. Okay. When you are gone, who is in charge?

A. Pan Hedrick.

Q. There is no question as to his being a supervisor? A. Not at all.

Mr. Tremaine: Whom are you referring to now?

Mr. Merrick: Mr. Hedrick. There is not, is there?

Mr. Tremaine: No. He is the foreman.

Q. (By Mr. Merrick): One more question. Now, if the steel or rollway incident took place prior to the writing of that contract, would it have made any difference? A. I see none.

Q. In other words, prior to the writing of that contract you were operating under an agreement which was essentially identical to that?

A. That is right. [256]

MARTIN L. SULLIVAN

recalled as a witness on behalf of the Respondent, having been previously sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Tremaine:

Q. What is your occupation, Mr. Sullivan?

A. Industrial Relations Manager for the Columbia River Paper Mills; Oregon Pulp & Paper; Leadbetter Logging & Lumber Company, and the Willamette Shingle Company, and various other affiliated companies of the Columbia River Paper Company.

Q. Are the officers of the Leadbetter Logging Company also the officers of the other companies?

A. Very much the same officers.

Q. So that the same executive personnel work for all four or five of these various companies?

A. Yes, sir. [257]

Q. And are the policies the same on the part of all of these companies?

A. The policies are practically the same on all of their operations as far as labor relations are concerned. I am talking about the labor relations part.

Q. And have all these four companies always been considered the same operation, or the same operations?

A. They are all under the one holding company, and they are practically one big family operating under the holding company.

Q. How long have you been with the Leadbetter Logging Company?

(Testimony of Martin L. Sullivan.)

A. Two years last September.

Q. Briefly, what was your connection with booms prior to that time?

A. Well, since 1919, after the First World War, I have been connected with logging operations and sawmills, and for the last six years or seven years I have been engaged in labor relations dealing with logging and sawmills and wood operations.

Q. And now, when the Leadbetter Logging Company took over the Oswego boom, briefly what happened in relation to negotiations for a new contract, and in the relations between the Company and the Union?

A. Well, the Company took it over I believe in February of 1947, and the first agreement that was signed by the Union and the Leadbetter Logging & Lumber Company was signed on July 18, 1947. [258]

Q. Had there been a sort of an interim arrangement between the time that the Leadbetter Company took over and the time of the signing of the contract?

A. The Company had been following the policy of the other booms in the Portland area, and following along with what we refer to as the agreement that they all had at that time, which was similar.

Q. And you say negotiations led to the contract being signed—negotiations entered into after the Leadbetter Company took over the Company, which

(Testimony of Martin L. Sullivan.)

culminated in the contract being signed on July 18, 1947.

A. At the time that the Leadbetter Logging Company took the boom over negotiations started, shortly after the first of April of that year. That is when the top committees met, and the agreements were all opened, and that was when the final agreement—that is, the agreement that is in effect, with the exception of one clause, was put into effect. [259]

* * *

Q. (By Mr. Tremaine): Now, what has been the policy of the Leadbetter Logging Company in its labor relations with this Union?

A. What has been its policy?

Q. Yes.

A. To get along with the Union at all times; to give away our shirt when we have to.

Q. Do you have contracts with the IWA in other operations?

A. Yes, we have several contracts with the IWA.

* * *

A. All right. The Leadbetter Logging Company has. We have a logging agreement at Peedee, Oregon, with the CIO.

Q. Who is that with? [264]

A. That is with the International Woodworkers of America, CIO.

(Testimony of Martin L. Sullivan.)

Q. And do you have a Union Shop clause in the agreement or contract?

A. We have a Union Shop clause in that.

Q. And did you consent to the election which was held as a part of the Taft-Hartley proceedings?

A. We agreed to a consent election.

Q. And do you have any other contracts with labor unions?

A. With reference to the Leadbetter Logging we have the Oswego agreement, which is being referred to there. We have an agreement at McMinnville, Oregon, with the AFL Sash & Door Millmen's Union.

Q. Is that a Union Shop agreement?

A. Union Shop. A consent election that we agreed to.

* * *

Trial Examiner Plost: You may make another offer of proof if you want to.

Mr. Tremaine: I will make this offer of proof, that this witness would testify that the Leadbetter Logging Company and their sawmill at Kernville, Oregon, in 1947, entered into a contract with the Union there involving a Union Shop Clause in [265] the contract. There was no question of representation there. And this witness will go further and state that these four companies, the Columbia River Paper Mills, Oregon Pulp & Paper, Leadbetter Logging & Lumber Company, and the Willamette Shingle Company have a total of 21 operations on which they have Union contracts covering several

(Testimony of Martin L. Sullivan.)

thousands of men, both with this IWA and other Unions, and that practically in every instance they have granted a Union Shop clause, or at least maintenance membership; that there have been no questions raised in the various operations but that the Company would sit down and negotiate with the Union concerning Union Shop provisions.

This witness can testify further as to the satisfactory relations between the Leadbetter Logging Company and these other companies with the Union for a matter of years.

Furthermore, there have been no unfair labor practices ever charged against any of these four companies during their history of operations with the Unions. That is all. [266]

* * *

Q. (By Mr. Tremaine): Mr. Sullivan, did any grievance ever reach you concerning this pike pole business?

A. I never heard of the pike pole business until the testimony today.

Q. Would you have been in a position to have sat in on a grievance concerning pike poles if it had not been settled satisfactorily at the foreman and job steward level?

A. Eventually it would have come to top level, in which case I would have sat in on it, but it never did, so eventually any grievance over pike poles must have been settled on the job, because it never came up to us. [269]

* * *

(Testimony of Martin L. Sullivan.)

Examination

By Trial Examiner Plost:

Q. In your capacity of personnel director of these four companies, including the Leadbetter Logging & Lumber Company, had you ever been informed by Mr. Hedrick that he had trouble with the Union or with Mr. Cool because of incidents relating [270] to what has been referred to here as pike pole pushing?

A. I had never heard of it.

Q. Were you ever told by Mr. Hedrick that Mr. Cool had walked off the job without authority?

A. I had never been told that.

Q. Were you ever told by Mr. Hedrick that Mr. Cool stopped the work of unloading of logs from the railroad cars, as has been testified to here?

A. I had never been told that.

Q. Were you ever told about the so-called steel incident in which Mr. Cool was involved?

A. I had never been told that.

Q. You had never been told that?

A. I had no knowledge of it whatever until our final meeting and the Comany's refusal to hire Mr. Cool, and I sat in on that. That is the first I heard of it.

Q. But prior to that no complaint was made to you about Cool or his actions? A. No. [271]

* * *

ED MAHER

recalled as a witness on behalf of the General Counsel, recalled in rebuttal, having been previously sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Merrick:

Q. Now, you have been present throughout the hearing, Mr. Maher, have you?

A. Yes sir. [272]

Q. And you have heard the testimony relating to the skid incident?

A. Yes, sir. [273]

* * *

Q. Do you know how this grievance arose over this maintenance work?

A. Yes. When they told me to go up and do this work I had four or five logs to be rafted, and I called the job steward and told him that they were taking part of the crew up on the hill for bull cooking.

Q. Whom did you call?

A. Bob Cool, who was the job steward at that time.

Q. Did the crew take any action on that?

A. The crew that was rafting took the action that they were not going to do it.

Q. Did you call Cool and notify him of that fact?

A. Yes, sir.

Q. And he went up to see Mr. Hedrick pursuant to your directions?

A. That is correct.

(Testimony of Ed Maher.)

Q. And now, do you know anything about this steel incident? Just a minute. When they refer to the steel incident, is that moving of the rails?

A. That was some old steel that was up there, and the men went into an awfully long conversation about that because it was not boom work and it was ruining their calked shoes.

Q. In other words, the men were protesting working on the steel because it was ruining their calked shoes? [274]

A. Yes, sir.

Q. How much does a pair of calks cost?

A. Around thirty bucks. And we talked down on the job about the steel incident, and that it should be stopped.

Q. You talked on the raft about it?

A. Yes, sir.

Q. Who on the raft were discussing it?

A. In fact all of us did.

Q. Was Mr. Cool called in on the discussion?

A. Absolutely. We had to call him in.

Q. How about the other members of the grievance committee, were they notified of it?

A. Apparently they were. Ernie Brazeau, he was on the committee, and he was notified about it, and he was on the raft.

Q. Was the other committee man member notified?

A. The other committee member was up on the hill.

Q. And who was that?

A. That was "Bud" Saulsbury.

(Testimony of Ed Maher.)

Q. He was on the hill? A. Yes, sir.

Q. And he was not notified because he was on the hill?

A. That would be quite a ways to go up for him.

Q. Were there any directions given to Brazeau and Cool regarding this steel?

A. Yes. The orders were to stop it. [275]

Q. And did they act pursuant to those orders?

A. Yes, they did.

Cross-Examination

By Mr. Tremaine:

Q. Did you have authority to tell the job steward to stop the job?

A. We didn't tell him to stop the job.

Q. Well, you just got through saying that you told him to stop the job. Not the job. It was the steel work. He was not talking about the job. He was talking about the steel work—bull cooking up there on the steel job. Do you have authority to stop that work?

A. When they pull men off the raft to do that work, yes.

Q. And so you ordered Cool to stop that work?

A. Well, it was not an order. The whole crew was talking.

* * *

Mr. Merrick: I have no further witnesses, but I would like to make a motion to amend the complaint to conform to the proof as to minor and

(Testimony of Ed Maher.)

purely informal matters, such as the [276] spelling of names and dates, and so forth. I have no intention of varying the substance of the complaint. It is purely a formal motion.

Trial Examiner Plost: Is there any objection?

* * *

Mr. Tremaine: No objection.

Trial Examiner Plost: There being no objection, the motion will be granted. Anything further? [277]

* * *

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LEADBETTER LOGGING & LUMBER CO.,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board—Series 5, as amended (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled,

“In the Matter of Leadbetter Logging & Lumber Co. and International Woodworkers of America, Local Union 11-81, CIO,” the same being known as Case No. 36-CA-47 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Louis Plost Trial Examiner for the National Labor Relations Board, dated October 18, 1949.

(2) Stenographic transcript of testimony taken before Trial Examiner Plost on October 18 and 19, 1949, together with all exhibits introduced in evidence, also all rejected exhibits.

(3) Joint telegraphic request of all parties for extension of time to file briefs, dated November 5, 1949.

(4) Copy of Chief Trial Examiner's telegram, dated November 8, 1949, granting all parties an extension of time in which to file briefs.

(5) Respondent's and Union's telegram, dated November 21, 1949, requesting further extension of time in which to file briefs with the Trial Examiner.

(6) Copy of Chief Trial Examiner's telegram, dated November 22, 1949, granting all parties extension of time in which to file briefs.

(7) Respondent's proposed findings of fact and conclusions of law, received December 8, 1949.

(8) Copy of Trial Examiner Plost's Intermediate Report, dated December 29, 1949 (annexed to item 12 hereof); order transferring case to the Board, dated December 29, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(9) Respondent's letter, dated January 6, 1950, requesting an extension of time in which to file exceptions and brief and also requesting permission to argue orally before the Board.

(10) Copy of Board's telegram dated January 9, 1950, granting all parties extension of time in which to file exceptions and briefs.

(11) Respondent's exceptions to the Intermediate Report, received January 31, 1950, containing request for oral argument.

(12) Copy of Decision and Order issued by the National Labor Relations Board on April 19, 1950, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

(13) Respondent's petition for reconsideration, received May 2, 1950.

(14) Copy of order correcting Decision and Order, dated May 18, 1950, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 25th day of September, 1950.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National Labor Relations
Board.

[Endorsed]: No. 12701. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Leadbetter Logging & Lumber Co., Respondent. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed September 29, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 12701

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LEADBETTER LOGGING & LUMBER COM-
PANY,

Respondent.

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

In this proceeding petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board's findings of fact and conclusions that respondent discriminated in regard to hire in violation of Section 8 (a) (3) and (1) of the National Labor Relations Act, as amended, are supported by substantial evidence.

2. The Board's order is in all respects valid and proper.

3. A decree should be entered enforcing the Board's order in full.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

Washington, D. C., September 25, 1950.

[Endorsed]: Filed September 29, 1950.

[Title of Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Leadbetter Logging & Lumber Co., Oswego, Oregon, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Leadbetter Logging & Lumber Co. and International Woodworkers of America, Local Union 11-81, CIO," Case No. 36-CA-47.

In support of this petition the Board respectfully shows:

(1) Respondent is an Oregon corporation engaged in business in the State of Oregon, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with

this Court herein, to which reference is hereby made, the Board on April 19, 1950, duly stated its findings of fact and conclusions of law, and issued an order which, as corrected by order dated May 18, 1950, is directed to the Respondent, and its officers, agents, successors, and assigns. The aforesaid order, as corrected, provides as follows:

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Leadbetter Logging & Lumber Co., Oswego, Oregon, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Woodworkers of America, Local Union 11-81, CIO, or any other organization of its employees, by refusing employment to any applicant because of such applicant's membership in, and activities on behalf of, a labor organization, or by discriminating in any other manner in regard to hire and tenure of employment, or any term or condition of employment;

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which

the Board finds will effectuate the policies of the Act:

(a) Offer to Robert Irwin Cool immediate and full employment in the same or substantially equivalent position for which he applied and which the Respondent refused him on or about September 4, 1948, without prejudice to his seniority or other rights and privileges;

(b) Make whole Robert Irwin Cool for any loss of wages he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of the discrimination against him to the date of the Respondent's offer of employment, less his net earnings during said period;

(c) Post at its boom operation at Oswego, Oregon, copies of the notice attached hereto and marked Appendix A.⁴ Copies of said notice to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by the

⁴In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be inserted before the words: "A Decision and Order," the words: "A Decree of the United States Court of Appeals Enforcing."

Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region (Seattle, Washington) in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

(3) The Board's Decision and Order, also order correcting Decision and Order were served upon Respondent on April 19, 1950, and May 18, 1950, respectively, by sending copies thereof postpaid, bearing Government frank, by registered mail to Respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, order of April 19, 1950, and order of May 18, 1950, correcting said order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing

in whole said order of the Board, and requiring Respondent, and its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 25th day of September, 1950.

Appendix A

Notice to All Employees
Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Woodworkers of America, or any other labor organization of our employees, by refusing employment to any applicant because of his membership in and activities on behalf of a labor organization, or by discriminating in any other manner in regard to hire and tenure of employment, or any term or condition of employment, except as required by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act;

We Will Not in any like or related manner interfere with, restrain, or coerce our employees

in the exercise of their rights guaranteed in Section 7 of the Act.

We Will offer Robert Irwin Cool immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

LEADBETTER LOGGING &
LUMBER CO.

(Employer)

Dated

By,

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed September 29, 1950.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT TO PETITION
FOR ENFORCEMENT OF ORDER OF
NATIONAL LABOR RELATIONS BOARD

Respondent, Leadbetter Logging and Lumber Company for answer to the petition of National Labor Relations Board for enforcement of an order of that board alleges as follows:

1. Petitioner under date of April 19, 1950, issued its order which as corrected by order of May 18, 1950, is set forth in Paragraph 2 of Petitioners petition for enforcement. Said order as corrected among other things provided that Leadbetter Logging and Lumber Company shall:

1. Cease and desist from:

(a) Discouraging membership in International Woodworkers of America, Local Union 11-81, C.I.O., or any other organization of its employees, by refusing employment to any applicant because of such applicant's membership in, and activities on behalf of, a labor organization, or by discriminating in any other manner in regard to hire and tenure of employment, or any term or condition of employment;

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act:

2. Take the following affirmative action, which

the Board finds will effectuate the policies of the Act:

(a) Offer to Robert Irwin Cool immediate and full employment in the same or substantially equivalent position for which he applied and which the Respondent refused him on or about September 4, 1948, without prejudice to his seniority or other rights and privileges;

(b) Make whole Robert Irwin Cool for any loss of wages he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of the discrimination against him to the date of the Respondent's offer of employment, less his net earnings during said period.

2. The petition of National Labor Relations Board should be dismissed and the order and corrected order denied enforcement. The "Finding of Facts" on which said orders are based are not supported by substantial evidence. Said "Finding of Facts" are directly in conflict with the evidence presented in these proceedings. The "Conclusions of Law" likewise are not supported by the evidence educed at the hearing and are contrary to law.

3. The evidence without contradiction establishes that Respondent at all times has enjoyed harmonious relations with Unions representing its employees. At no time has Respondent attempted to discourage membership of its employees in any labor organization, including International Woodworkers of America, Local Union 11-81, C.I.O. Respondent has

not refused employment to any person because of membership in, or activity in behalf of, a labor organization. It has not discriminated in regard to hire and tenure of employment or any term or condition of employment.

There is no evidence that Respondent has in any way interfered with, restrained, or coerced its employees in the exercise of rights guaranteed by Section 7 of the Act. The evidence establishes that Respondent has not violated Section 7 of the Act.

4. Robert Cool, a shop steward while employed by Respondent, quit his job. His conduct while employed warranted his discharge. The fact that the Respondent did not discharge him at the time of the occurrences justifying his discharge, does not require Respondent to re-employ him at a later date.

5. The order as corrected purports to require Respondent to offer Cool immediate and full employment. This requirement violates Section 10-c of the National Labor Relations Act. The order as corrected exceeds the authority of Petitioner, National Labor Relations Board.

Wherefore, Respondent prays for a decree of this Court to dismiss said petition for enforcement, deny enforcement of said order of April 19, 1950, and as corrected by said order of May 18, 1950.

/s/ RICHARD R. MORRIS,
Attorney for Respondent, Leadbetter Logging &
Lumber Co.

[Endorsed]: Filed October 11, 1950.

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America to Leadbetter Logging & Lumber Co., 1405 S.W. Alder, Portland, Oregon, and International Woodworkers of America, Local Union 11-81, CIO, Route 1, Oswego, Oregon,

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 29th day of September, 1950, a petition of the National Labor Relations Board for enforcement of its order entered on April 19, 1950, in a proceeding known upon the records of the said Board as

“In the Matter of Leadbetter Logging & Lumber Co., and International Woodworkers of America, Local Union 11-81, CIO, Case No. 36-Ca-47,”

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth

Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 29th day of September, in the year of our Lord one thousand, nine hundred and fifty.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

Return on Service of Writ

United States of America,
District of Oregon—ss.

I hereby certify and return that I served the annexed Order to Show Cause on the therein-named International Woodworkers of America, Local Union 11-81, C.I.O., by handing to and leaving a true and correct copy thereof with George Willet, secretary, personally, at Oswego, in said District, on the 13th day of October, 1950.

JACK R. CAUFIELD,
U. S. Marshal.

By /s/ EARL T. ESBAIA,
Deputy.

Marshal's Docket No. 14332.

Return on Service of Writ

United States of America,
District of Oregon—ss.

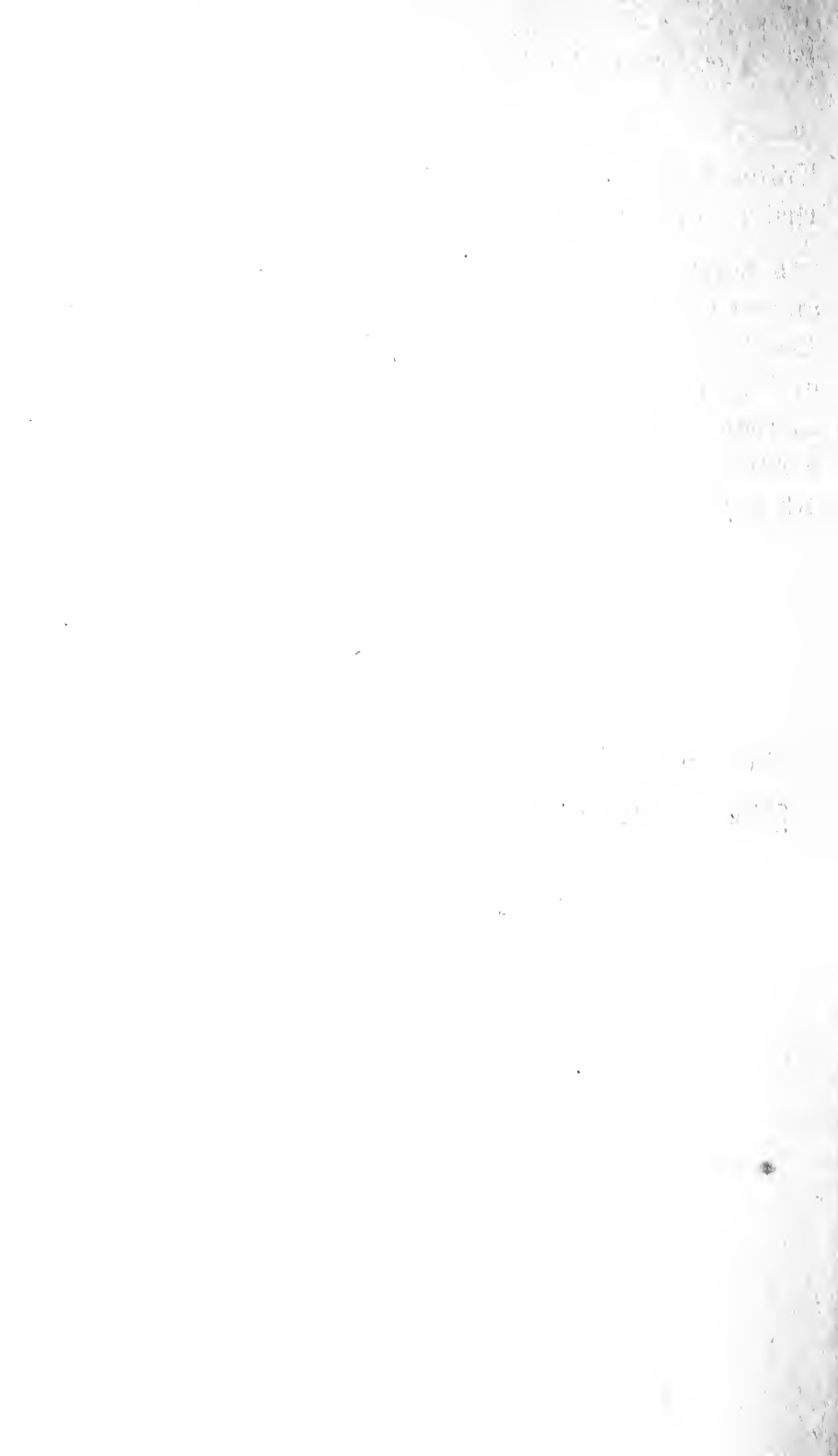
I hereby certify and return that I served the annexed Order to Show Cause on the therein-named Leadbetter Logging Co. by D. C. Ellsworth, Sec., by handing to and leaving a true and correct copy thereof with Leadbetter Logging Co. by D. C. Ellsworth, Sec., at Portland, in said District, on the 4th day of October, 1950.

JACK R. CAUFIELD,
U. S. Marshal.

By /s/ FRANK L. MEYER,
Deputy.

Marshal's Docket No. 14332, Civil CA 12701.

[Endorsed]: Filed October 21, 1950.



No. 12701

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LEADBETTER LOGGING & LUMBER COMPANY, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,

General Counsel,

DAVID P. FINDLING,

Associate General Counsel,

A. NORMAN SOMERS,

Assistant General Counsel,

SAMUEL M. SINGER,

ROBERT G. JOHNSON,

Attorneys,

National Labor Relations Board.

FILED

DEC 28 1950

PAUL R. O'BRIEN

CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 12701

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LEADBETTER LOGGING & LUMBER COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151, *et seq.*), for the enforcement of its order issued against Leadbetter Logging & Lumber Company, respondent herein, on April 19, 1950, and modified on May 18, 1950, following the usual proceedings under Section 10 of the Act, as amended. The Board's decision and order (R. 14-42, 47-53, 55-56)¹ are reported in 89 N. L. R. B. No. 80. This Court

¹ References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

has jurisdiction of the proceeding under Section 10 (e) of the Act, as amended, the unfair labor practices having occurred in Oswego, Oregon, within this judicial circuit.²

STATEMENT OF THE CASE

I. The Board's findings of fact

A. Respondent's discrimination against Employee Cool

1. *Cool's employment record prior to December 1947*

Respondent purchased the Oswego boom from the Reconstruction Finance Corporation in February 1947 (R. 17; 187, 191). At the time it assumed the operation, Respondent retained the crew then employed, including Robert Irwin Cool. Cool had been employed on the boom by its various operators since 1941, but had left the boom at some unspecified time (R. 17; 72, 119, 120, 187). In 1946 he was rehired on the recommendation of Foreman Hedrick,³ and continued to work at the boom until December 1947, when he voluntarily quit (R. 17; 72, 91-92).

There is no dispute that Cool was a satisfactory boomman throughout the period of his employment with respondent and its predecessors (R. 17; 70-71, 75-76, 95, 139, 151-152). At the hearing before the

² Respondent, an Oregon Corporation, is engaged in logging and lumber operations in the State of Oregon, including a boom operation at Oswego, Oregon, which is involved in this proceeding (R. 16; 5, 10, 63-64). A boom is an operation at which logs received by rail are unloaded and placed into a stream and made up into rafts for towing to their final destination (R. 16; 67). No jurisdictional issue is presented since respondent admits that it is engaged in commerce within the meaning of the Act (R. 61-62).

³ Roy T. Hedrick, foreman of the Oswego boom since 1944, was in direct charge of the Oswego boom under Transportation Supervisor Kerry (R. 17; 68, 189).

Board, the head rafter, to whom Cool was directly responsible, described him as "a good workman" (R. 154). Foreman Hedrick admitted that Cool could perform any job on the operation with the possible exception of running a donkey engine (R. 17; 70-71, 76), and respondent conceded that Cool was competent (R. 17; 139).

2. Cool's Union activities as job steward

During the period of Cool's employment with respondent, a collective bargaining agreement was in effect between the Company and the International Woodworkers of America, Local Union 11-81, CIO, hereinafter called the Union (R. 18; 102-104). In February 1947, Cool was elected job steward, and as such was charged with the presentation of grievances to the Company (R. 19; 76, 108-109, 115, 122-123). The contract between the Company and the Union expressly provided for the initial settlement of grievances by the steward and the foreman (R. 104-105). In accordance with established practice, the grievances were taken up with the foreman during working hours (R. 90, 110-111, 115, 159-160, 172, 182). Cool, as steward, handled many grievances on behalf of the employees, but in doing so, he incurred the displeasure of Foreman Hedrick.

Thus, one day in July 1947, Cool disputed Foreman Hedrick's right to assign employees to "bull cooking" (maintenance work) on the skids or rollway. In the operation of the Oswego boom, logs are unloaded from railroad cars and then rolled into the water on skids where they are made up into rafts

(R. 21; 67, 128). From time to time it is necessary to repair the skids due to wear and tear (R. 166). Cool and another committeeman testified at the hearing that there was an understanding between the Union and respondent, however, that there should be no maintenance work on days when 50 or more cars of logs were to be handled (R. 23; 127, 128-129, 147-148). Cool, believing that Hedrick had violated this agreement on the day in question, registered a protest (R. 23; 125-126, 159, 196). Hedrick first ignored Cool's protest,⁴ but after calling the Company's office "to find out what was what," he directed the men to stop the work, in accordance with Cool's request (R. 22; 83, 126-127).

Shortly thereafter, the "steel incident" arose. Foreman Hedrick called some men from the raft to move some steel or railroad iron. The men complained about doing this type of work "because it was not boom work and it was ruining their calked shoes,"⁵ and requested Cool and Brazeau, another member of the Union job committee, "to stop it" (R. 24-25; 196-198). Job Steward Cool and other committeemen going to the scene were met by Hedrick who told them that the men would have to continue moving the steel (R. 24; 165). Having protested to Hedrick, Cool and Brazeau left. Hedrick

⁴ Hedrick, denying the existence of the agreement at that time, stated that the policy was instituted immediately after the incident, and added that in any event he did not consider himself bound by it because he did not personally make it (R. 23; 85, 87, 169, 184-185).

⁵ Calked shoes are a type of safety shoe, costing about \$30, worn by men who work on floating timber (R. 25; 179, 197).

then told the boommen to stop moving the steel and return to the raft (R. 24; 165).

At about this same period, Cool on one occasion left the job for an hour and a half to see the Union's business agent (R. 25-26; 88, 132, 174). During Cool's absence, Hedrick assigned two men to move a boathouse for an adjoining landowner (R. 26; 89, 132). Upon his return, Cool protested this assignment as being work outside the Union contract and a violation of the State's insurance laws (R. 26; 88-89, 132, 140-141). Hedrick conceded at the hearing that this job "was a separate job from that of the Leadbetter Company" (R. 89).

On another occasion, Cool and Hedrick engaged in "quite a heated discussion" on a matter of seniority (R. 26; 130-131, 140, 159). Cool, "speaking as a representative of the Union," objected to Hedrick's expressed intention to grant greater seniority to a non-Union man than to a Union man who had worked one day longer (*ibid.*). This complaint, like the others already discussed, was made at the request of Cool's fellow Union members (R. 26; 130).

The remaining disputes between Hedrick and Cool were caused by Hedrick's "pike pole pushing," that is, work performed by Hedrick in the rafting of logs during the boom operation (R. 26; 90, 173). The contract between respondent and the Union prohibited performance of actual labor by the foreman (R. 26-27; 110, 124, 173, 182). Hedrick admitted that he "pushed a pike pole" in violation of the contract and that all job stewards previous to, following, and including Cool had stopped him (R. 27; 90, 173,

182). Hedrick testified that "I knew that I was violating our contract, and I would argue with them a little bit, maybe, but it didn't do me a hell of a lot of good" (R. 182).

Foreman Hedrick openly resented Cool's handling of grievances. On one occasion, when Hedrick took one of the men to help fix a broken pipe, he complained, "I suppose Bob [Cool] will come up here now and try to stop us from doing this work. If he does, he is going to get fired, if he does not watch out." (R. 31; 158). On another occasion, when Cool protested Hedrick's determination to extend seniority to a non-Union man over a Union man with longer service (*supra*, p. 5), Hedrick cursed the Union vehemently (R. 159, 176, 183).

3. Respondent's refusal to reemploy Cool in September 1948

As already noted (*supra*, p. 2), Cool quit his job in December 1947. During the summer of 1948, Cool applied for reemployment but Hedrick told him that there was no work available (R. 18; 92, 137-138). When a vacancy developed in September 1948, Hedrick, in accordance with established practice, requested the Union to furnish a boom man (R. 18; 92, 111-112, 117, 162). The Union thereupon offered Cool (R. 18; 92, 111, 162). Hedrick, however, refused to hire him (R. 18; 93, 111, 163). Instead, he hired an inexperienced non-Union man to fill the vacancy (R. 18; 99-100, 112-113, 148-149, 178-179).

Following the refusal to hire Cool, the Union, in accordance with its contract, filed a formal grievance (R. 27; 113-114). Thereafter, three meetings were held: first with the foreman, Hedrick, then with the superintendent, Kerry, and, finally, with the job committee (R. 28; 150). At the initial meeting, Hedrick said that Cool was refused the job because he was "incompetent" and a "troublemaker" (R. 28; 113, 148, 150). At the final meeting,⁶ however, Hedrick acknowledged that Cool "was competent all right but that he would not do his work" (R. 29; 114, 148). Emphasizing his determination not to rehire Cool, Hedrick stated that either he or Cool "had to step out" (R. 29; 150, 176). Thereupon, respondent's representatives asserted that they "would hire whoever they saw fit," and if the Union was not satisfied, it could file charges (R. 29; 114). Thereafter, the Union filed unfair labor practice charges, alleging respondent's discriminatory refusal to rehire Cool on account of his outstanding activities on behalf of the Union (R. 1-3).

II. The Board's conclusions

On the basis of the foregoing facts and the entire record, the Board concluded (R. 48, 33) that respondent, in violation of Section 8 (a) (3) and (1)

⁶ At the final grievance meeting, at which both Hedrick and Cool were present, the Union was represented by its district secretary, Garrison, its business agent, George Willett, and the job committee. Respondent was represented by Superintendent Kerry, and Martin S. Sullivan, its labor relations manager and personnel director (R. 27-28; 65, 113-114).

of the Act, refused employment to Employee Cool “on or about September 4, 1948, because of his previous conduct in vigorously carrying out his duties as job steward for the Union and in seeking to enforce the terms of the collective bargaining agreement between the Union and the Respondent.” In reaching its conclusion, the Board rejected respondent’s contentions (*infra*, pp. 12–14), that Cool was refused employment because, in carrying out his duties as job steward, in 1947, he had interfered with the authority of the foreman, was guilty of insubordination and trouble making, and was in other respects an unsatisfactory worker (R. 33).

III. The Board’s order

The Board’s order requires respondent to cease and desist from discouraging membership in the Union by discrimination in regard to hire and tenure of employment, or any term or condition of employment, and from in like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act. Affirmatively, the order requires respondent to offer Cool reinstatement with back pay; and to post appropriate notices (R. 50–53, 55–56).

QUESTION PRESENTED

Whether substantial evidence supports the Board’s finding that respondent, in violation of Section 8 (a) (3) and (1) of the Act, refused to rehire Employee Cool because of his previous Union activities as job steward.

ARGUMENT

Substantial evidence supports the Board's finding that respondent, in violation of Section 8 (a) (3) and (1) of the Act, refused to reemploy Cool because of his previous activities as job steward

We submit that the record well supports the Board's finding (R. 48, 33) that respondent refused to reemploy Cool in September 1948 because of his Union activities as a job steward in his previous employment with respondent.

As already shown (pp. 2-3), in September 1948, Cool had a record of 18 years employment as boomman, the job for which he had applied. His work was concededly satisfactory (R. 17; 70-71, 76, 139, 154). Respondent had retained him in its employ when it acquired the business in January 1947. Foreman Hedrick had recommended him for the job with respondent's predecessor (*supra*, p. 2). Indeed, Hedrick testified that Cool could perform almost any job on the boom (*supra*, p. 3). In these circumstances, it is significant that in filling a vacancy in September 1948, Hedrick completely ignored Cool's qualifications and, instead, hired a new inexperienced employee. Cf. *N. L. R. B. v. American Potash & Chemical Corp.*, 98 F. 2d 488, 493-494 (C. A. 9), certiorari denied, 306 U. S. 643; *N. L. R. B. v. Moltrup Steel Products Co.*, 121 F. 2d 612, 615 (C. A. 3).

Hedrick's motivating reason for refusing employment to Cool is not difficult to discern. Cool, as job steward, conscientiously enforced the contract with the Company and vigorously processed grievances thereunder. These activities involved disputes with

Foreman Hedrick (R. 107, 137, 158). Cool had a "heated discussion" with him concerning seniority of a Union man over a non-Union man (*supra*, p. 5). He disputed Hedrick's right to perform "pike pole pushing," questioned his assignment of work outside the Union contract, and objected to the performance of maintenance work on certain days (*supra*, pp. 3-6).

Hedrick openly expressed his resentment of these activities. Thus, he told Employee Saulsbury that Cool "is going to get fired, if he does not watch out" (R. 31; 158), and admitted that he might have "cussed" the Union "every day" (R. 176).⁷

There is no question but that the presentation of grievances by Job Steward Cool was a concerted activity protected by the Act. Section 9 (a) of the Act expressly guarantees to "any individual employee or a group of employees" the right "at any time to present grievances to their employer." Accordingly, the courts have repeatedly condemned discrimination practiced against employees because they handle grievance matters. *N. L. R. B. v. Waterman Steamship Corp.*, 309 U. S. 206, 223; *N. L. R. B. v. Tovrea Packing Co.*, 111 F. 2d 626, 629 (C. A. 9),

⁷ Respondent, in attempting to refute the charge of discriminatory motivation in refusing reemployment to Cool, cited the allegedly harmonious relationship between Hedrick and Maher, Cool's predecessor as job steward. Hedrick conceded, however, that "we didn't have so many grievances at that time, about the only grievances that we had was my pushing a pike pole," as to which, he stated, he "would argue" only "a little bit" because "I knew that I was violating our contract" (R. 172, 182). In any event, the protected character of Cool's activity did not hinge upon whether he presented grievances in a manner which Hedrick found pleasing.

certiorari demed, 311 U. S. 668; *N. L. R. B. v. Kennametal, Inc.*, 182 F. 2d 817, 819 (C. A. 3); *N. L. R. B. v. Gullett Gin Co.*, 179 F. 2d 499, 502 (C. A. 5); *American Steel Foundries v. N. L. R. B.*, 158 F. 2d 896, 899 (C. A. 7); *N. L. R. B. v. W. C. Bachelder*, 120 F. 2d 574, 578 (C. A. 7), certiorari denied, 314 U. S. 647; *N. L. R. B. v. Nelson Mfg. Co.*, 120 F. 2d 444, 446 (C. A. 8). Such conduct is unquestionably a violation of Section 8 (a) (1) because it interferes with, restrains and coerces employees in the exercise of the right to engage in concerted activities for mutual aid or protection. It is also a violation of Section 8 (a) (3) because "such discrimination necessarily discourages union membership—at the very least that of the discharged employees—and therefore such discharge is *ipso facto* a violation of Section 8 (3) [citing cases]," *N. L. R. B. v. J. G. Boswell Co.*, 136 F. 2d 585, 596 (C. A. 9). To the same effect, see *N. L. R. B. v. Walt Disney Products*, 146 F. 2d 44, 49 (C. A. 9), certiorari denied, 324 U. S. 877; *N. L. R. B. v. National Motor Bearing Co.*, 105 F. 2d 652, 658-659 (C. A. 9); *N. L. R. B. v. Nelson Mfg. Co.*, 120 F. 2d 444, 446 (C. A. 8); *N. L. R. B. v. Brezner Tanning Co.*, 141 F. 2d 62, 64 (C. A. 1).⁸

⁸ Respondent's contention that the record here does not in fact disclose any discouragement of union membership on the part of any particular employee is wholly untenable. The "test of interference, restraint and coercion under * * * the Act does not turn * * * on whether the coercion succeeded or failed [citing cases]. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *N. L. R. B. v. Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7). See also. *N. L. R. B. v. Donnelly Garment & Co.*, 330 U. S. 219, 231; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 588; *N. L. R. B. v. Brezner Tanning Co.*, 141 F. 2d 62, 64 (C. A. 1); *N. L. R. B. v. John*

It matters not that in pressing grievances, Cool may have mistakenly believed that the Company had violated the terms of the Union contract. In analogous situations involving strike activity, the Supreme Court has stated, "The wisdom or unwisdom of the men, the justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude" does not deprive a concerted activity of its protected character. *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344. It is sufficient that "In their minds it was a justified grievance." *Firth Carpet Co. v. N. L. R. B.*, 129 F. 2d 633, 636 (C. A. 2). The employees here believed in all cases that they had justifiable grievances. The "skid incident" was bottomed on their belief that Hedrick had violated the verbal understanding between the Union and the Company in regard to performance of maintenance work (*supra*, p. 4). The "steel incident" resulted from their view that the movement of steel "was not boom work" (*supra*, p. 4). And the "pike pole pushing" episodes flowed from contractual violations which Foreman Hedrick admitted (*supra*, p. 5).

Before the Board, respondent sought to justify its refusal to reemploy Cool by contending that, in carrying out his duties as job steward, Cool had interfered with authority of the foreman and was guilty of insubordination because he had "stopped" operations, and absented himself from work. In support of its contention respondent cited the "skid incident," the

Engelhorn & Sons, 134 F. 2d 553, 557 (C. A. 3); *N. L. R. B. v. Ford Brothers*, 170 F. 2d 735 (C. A. 6); *Joy Silk Mills v. N. L. R. B.*, 27 L. R. R. M. 2012 (C. A. D. C.), decided November 21, 1950.

“steel incident,” the “pike pole pushing” arguments, and the “raft incident” (*supra*, pp. 3-6).

The Board properly found (R. 33) that the “above-cited causes for * * * [the refusal to rehire] were not the real reason therefor but a mere pretext.” Any work stoppage that Cool may have effected was, as the record shows (*supra*, pp. 4-6), momentary and for the sole purpose of protesting respondent’s contractual violations then in progress, to prevent their becoming an accomplished fact.⁹ According to Foreman Hedrick’s own testimony, it was he who directed the actual suspension of the work. Thus, Hedrick testified that he had terminated the maintenance work on the skid or rollway after he had called respondent’s office and was “told” to cease this work (R. 83). Similarly, he testified that it was he who “sent the men back off the job” after the steel moving incident “so that they would have * * * [no] trouble with the Local” (R. 165). As to the “pike pole pushing” incidents, Hedrick stated: “I don’t know that they stopped, or whether they kept working, I do not think that they stopped, to be honest with you” (R. 182).

Equally without merit is the contention that in processing the grievances, Cool “left his work without authority” and “refused to work” (R. 18-19; 11-12). In the first place, each incident was of short

⁹ A work stoppage by employees to present a grievance is a protected concerted activity under the Act. See Sections 7 and 9 (a), and cases cited, *supra*, pp. 10-11, particularly, *N. L. R. B. v. Kenna-metal, Inc.*, 182 F. 2d 817, 819 (C. A. 3); *N. L. R. B. v. Tovrea Packing Co.*, 111 F. 2d 626, 629 (C. A. 9); and *Gullett Gin Co. v. N. L. R. B.*, 179 F. 2d 499, 502 (C. A. 5).

duration and was promptly settled (*supra*, pp. 3-6). Respondent at no time introduced, or even offered to introduce, evidence showing that Cool's Union activities affected his production. Secondly, it is admitted that it was the custom of the parties to settle grievances during working hours (*supra*, p. 3) and therefore, the parties necessarily contemplated that Cool leave his job for a reasonable period for that purpose.

Apart from absences to handle grievances, respondent also cited Cool's one-and-a-half-hour absence on one occasion to see the Union's business agent (*supra*, p. 5). That this isolated incident was not regarded significant by respondent is evident from Hedrick's own testimony that he merely advised Cool "that he would have to have permission *after that* if he wanted to leave the job" (R. 88). Moreover, it is not disputed that Cool had completed his work before he left that day (R. 132, 140). Hedrick testified that it was the established "policy" of the Company to grant "the men the privilege of going home when their work is done" (R. 170, 184).

It is thus clear that the conduct of Cool which respondent characterizes as "insubordinate" and "interference with the authority of the foreman" (R. 11-12) was no more than the traditional union activity of presenting grievances. Respondent itself did not take a sufficiently serious view of the "incidents" at the time of their occurrence to discharge or discipline Cool. Hedrick not only failed to protest Cool's way of handling grievances to the Union, as he had a right to do, but he did not even report Cool's alleged misconduct to his superiors (R. 20, 23, 26, 31;

108, 110, 160, 181, 194-195). Personnel Director Sullivan testified that he "had never heard" or "had never been told" about the incidents in question, until the grievance negotiations following Hedrick's refusal to rehire Cool, or the hearing of the instant case (R. 28; 195). As in *N. L. R. B. v. Electric City Dyeing Co.*, 178 F. 2d 980, 983 (C. A. 3), these incidents "apparently became intolerable only" when the need for a defense appeared.

The "raft incident", the only incident relied upon which was not bottomed on Cool's position as job steward, occurred one day in January 1947, before respondent acquired the Oswego boom, and a year before Cool had quit voluntarily (R. 20; 72, 91-92, 96). On the day in question, Cool was working on the raft, placing logs which were being floated down to form the raft. Foreman Hedrick went on the raft and told Cool to do the work in a different manner (R. 77-78, 133-134). Cool refused and requested Hedrick to leave the raft (*ibid.*). As in the case of the occurrences already discussed, Hedrick did not file a formal grievance against Cool, report the matter to his superiors, or discharge or discipline Cool therefor (R. 26; 77, 97, 134-135, 195). In fact, respondent later retained Cool in its employ when it purchased the boom (*supra*, p. 2). Thus, as in *Peoples Motor Express v. N. L. R. B.*, 165 F. 2d 903, 906 (C. A. 4), "there is real significance" in respondent's election "to revive an ancient (and apparently forgotten) complaint, and make it serve as the proffered excuse or reason" for the refusal to rehire.

On the entire record, the Board's conclusion (R. 48) that respondent's refusal to reemploy Cool

was motivated by his Union activities as job steward is reasonable. Cool's prompt and vigorous grievance activities, Foreman Hedrick's open resentment of such activities, Cool's admittedly satisfactory work, the fact that respondent filled the existing vacancy with a new and inexperienced employee, and the remoteness and inadequacy of respondent's purported reasons for refusing Cool employment amply support this conclusion.¹⁰

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid and proper in all respects, and that a decree should issue enforcing the Board's order in full.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

SAMUEL M. SINGER,
ROBERT G. JOHNSON,
Attorneys,

National Labor Relations Board

DECEMBER 1950.

¹⁰ Respondent's discriminatory refusal to hire Cool was the same in legal effect as an outright discharge of Cool in violation of Section 8 (a) (3) and (1). See, *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 182-187; *N. L. R. B. v. Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 834 (C. A. 9); *N. L. R. B. v. Waumbec Mills, Inc.*, 114 F. 2d 226, 233-234 (C. A. 1); *N. L. R. B. v. Milan Shirt Manufacturing Co.*, 125 F. 2d 376 (C. A. 6).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151, *et seq.*), are as follows:

SEC. 2. When used in this Act—

* * * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7:

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practices (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall

state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

No. 12701

**In the United States Court of Appeals
for the Ninth Circuit**

National Labor Relations Board, Petitioner

vs.

Leadbetter Logging & Lumber Company, Respondent

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF OF RESPONDENT, LEADBETTER
LOGGING & LUMBER CO.**

JARVIS B. BLACK

Attorney,

RICHARD R. MORRIS

Attorney,

Leadbetter Logging & Lumber Company

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**In the United States Court of Appeals
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No. 12701

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On Petition for Enforcement of an Order of the
National Labor Relations Board

**BRIEF OF RESPONDENT, LEADBETTER
LOGGING & LUMBER CO.**

We are concerned with whether the refusal of Respondent to employ Robert Cool was an unfair labor practice.

Respondent has suffered throughout this proceeding because of a misapprehension by the National Labor Relations Board and its representatives of the character of the controversy. Throughout, the Board and its representatives have treated the controversy as one involving the discharge of an employee for Union activity. The undisputed fact is that the person involved, Robert Cool, was not discharged (R. 91-92). Yet from the time of the first action by representatives of the Board, it has been treated as a discharge problem. For ex-

ample, the Examiner, who first heard the case, clearly thought that he had before him for decision the discharge of an employee for Union activity. His report and recommended order shows:

III. "The unfair labor practices. The discriminatory discharge of Robert Irwin Cool" (R. 17). "Concluding Findings on the Discharge of Robert Irwin Cool" (R. 32).

The Board attempted to cure this misapprehension by a footnote to its decision to the effect: "The Trial Examiner's inadvertant reference at various points in the Intermediate Report to the discharge of Cool is hereby corrected to refer to the refusal to hire Cool" (R. 49). But the Board emphasizes this mistaken approach by referring only to "Discharge" cases to support its decision and order. *N.L.R.B. v. American Potash & Chemical Corp.*, 98 F. 2d 488, 493-494 (C.A. 9); *N.L.R.B. v. Moltrup Steel Products Co.*, 121 F. 2d 612, 615 (C.A. 3); *N.L.R.B. v. Waterman Steamship Co.*, 309 U. S. 206, 223; *N.L.R.B. v. Tovrea Packing Co.*, 111 F. 2d 626, 629 (C.A. 9); *N.L.R.B. v. Kennametal, Inc.*, 182 F. 2d 817, 819 (C.A. 3); *N.L.R.B. v. Gullet Gin Co.*, 179 F. 2d 499, 502 (C.A. 5), appeal pending; *American Steel Foundries v. N.L.R.B.*, 158 F. 2d 896, 899 (C.A. 7); *N.L.R.B. v. Nelson Mfg. Co.*, 120 F. 2d 444, 446 (C.A. 8); *N.L.R.B. v. J. G. Boswell Co.*, 136 F. 2d 585, 596 (C.A. 9); *N.L.R.B. v. Walt Disney Productions*, 146 F. 2d 44, 49 (C.A. 9); *N.L.R.B. v. National Motor Bearing Co.*, 105 F. 2d 652, 658, 659 (C.A. 9); *N.L.R.B. v. Brezner Tanning Co., Inc.*, 141 F. 2d 62, 64 (C.A. 1); *N.L.R.B. v. Ford Bros.*, 170 F. 2d 735, 738 (C.A. 6); *Firth Carpet Co. v. N.L.R.B.*, 129 F. 2d 633, 636 (C.A.

2); *N.L.R.B. v. Electric City Dyeing Co.*, 178 F. 2d 980, 983 (C.A. 3); *Peoples Motor Express Co. v. N.L.R.B.*, 165 F. 2d 903, 906 (C.A. 4).

The following cases referred to by the Board in support of its decision and order are to be distinguished from the matter now before the Court because in each of these cases the employer had an anti-union background, an element lacking in the present matter. *N.L.R.B. v. American Potash & Chemical Corp.*, 98 F. 2d 488 (C.A. 9); *N.L.R.B. v. Tovrea Packing Co.*, 111 F. 2d 626 (C.A. 9); *American Steel Foundries v. N.L.R.B.*, 158 F. 2d 896 (C.A. 7); *N.L.R.B. v. Bachelder*, 120 F. 2d 574 (C.A. 7); *N.L.R.B. v. J. G. Boswell Co.*, 136 F. 2d 585 (C.A. 9); *N.L.R.B. v. Walt Disney Productions*, 146 F. 2d 44 (C.A. 9); *N.L.R.B. v. National Motor Bearing Co.*, 105 F. 2d 652 (C.A. 9); *N.L.R.B. v. Brezner Tanning Co., Inc.* 141 F. 2d 62 (C.A. 1); *N.L.R.B. v. Illinois Tool Works*, 153 F. 2d 811 (C.A. 7); *N.L.R.B. v. Ford Brothers*, 170 F. 2d 735 (C.A. 6); *Firth Carpet Co. v. N.L.R.B.*, 129 F. 2d 633 (C.A. 2); *N.L.R.B. v. Electric City Dyeing Co.*, 178 F. 2d 980 (C.A. 3); *Joy Silk Mills v. N.L.R.B.*, 27 L.R.R.M. 2012 (C.A.D.C.); *N.L.R.B. v. Mackay Radio and Telegraph Co.*, 304 U. S. 333.

The following cases referred to by the Board in support of its decision and order are to be distinguished from the matter now before the Court because in each of these cases the employer had no substantial cause for discharge or for a refusal to rehire. *N.L.R.B. v. Moltrup Steel Products Co.*, 121 F. 2d 612 (C.A. 3); *N.L.R.B. v. Waterman Steamship Co.*, 309 U. S. 206; *N.L.R.B.*

v. *Nelson Mfg. Co.*, 120 F. 2d 444 (C.A. 8); *N.L.R.B. v. Link Belt Co.*, 311 U. S. 584; *N.L.R.B. v. John Engelhorn & Sons*, 134 F. 2d 553 (C.A. 3); *Peoples Motor Express Inc., v. N.L.R.B.*, 165 F. 2d 903 (C.A. 4); *Gullett Gin Co. v. N.L.R.B.*, 179 F. 2d 499, (C.A. 5).

N.L.R.B. v. Kennametal, Inc., 182 F. 2d 817 (C.A. 3), cited by Board, can be distinguished in that Respondent conceded that the discharges were for leading a work stoppage.

N.L.R.B. v. Donnelly Garment Co., 330 U. S. 219, cited by Board, can be distinguished because it involves neither a discriminatory discharge or refusal to hire. The sole point is whether the Respondent there dominated and gave aid and assistance to an inside plant union.

Another feature is worthy of attention. The Hearing Officer recommended that the Respondent cease and desist from all violations of the Labor-Management Relations Act. The Board, however, found that, "We are not persuaded, upon this record, that the Respondent has demonstrated a general intent to defeat self organization and the attitude of opposition to the Act. * * * We are particularly mindful in this regard of the Respondent's past amicable relations with this and other Unions and the fact that the Respondent has been dealing with the Union under a collective bargaining agreement. Under all the circumstances we believe that the policies of the Act will be adequately effectuated by ordering the Respondent to cease and desist from the unfair labor practices found and from any like or related conduct" (R. 49-50).

The approach of the Board requires a statement of the facts to place the real question in its accurate background.

I. The relation of Respondent and Unions representing its employees must be given weight in judging Respondent's motives in refusing to employ Robert Cool. *Mt. Vernon-Woodberry Mills, Inc.*, 64 N.L.R.B. 294 (1945); *The Timken Roller Bearing Company* 60 N.L.R.B. 852 (1945); *Firestone Tire & Rubber Company* 67 N.L.R.B. 584 (1946).

II. The fact that Robert Cool was a Union representative does not guarantee him a job in spite of his insubordination and refusal to do his job. *Stonewall Cotton Mills v. N.L.R.B.* (5th C.), 129 F. 2d 629, 632 (1942); *N.L.R.B. v. Fulton Bag & Cotton Mills* (5th C.), 175 F. 2d 675, 677 (1949); *N.L.R.B. v. Reynolds Corp.* (5th C.), 168 F. 2d 877 (1948); *N.L.R.B. v. Carolina Mills* (5th C.), 167 F. 2d 212 (1948); *N.L.R.B. v. Goodyear Tire & Rubber Co.*, (5th C.), 129 F. 2d 661 (1942).

With this preface let us look at the facts:

STATEMENT OF THE CASE

Respondent, an Oregon Corporation, is engaged in logging and lumbering operations in the State of Oregon, including a boom operation at Oswego, Oregon. Respondent purchased the Oswego boom in February, 1947 (R. 17: 187, 191). Respondent retained the crew then employed, including Robert Irwin Cool, the person allegedly

discriminated against by a refusal to hire and the employee involved in this proceeding. Cool had been employed by the various operators of the boom from about 1941 (R. 119) until after the war broke out (R. 119). The work on the boom in question consists of unloading logs from railroad cars, down a skid and into the river where the logs are made into rafts. In 1946 Cool talked to Walter J. Kerry, Respondent's supervisor, about a job. Cool mentioned that he knew Roy T. Hedrick, Respondent's foreman, and after Kerry talked to Hedrick, Kerry hired Cool as a boom man upon Hedrick's recommendation (R. 72, 121-122). Cool continued to work at the boom until December, 1947, when he voluntarily quit (R. 72, 91-92). In 1948, Cool again applied to Respondent for a job by telephoning Hedrick who told him "No" (R. 92). A little later Hedrick asked George Willett, business agent, for a boom man. Willett said that Cool was available but Hedrick said he didn't want him (R. 92-93). The reason Hedrick refused to rehire Cool was for insubordination and overstepping his authority as job steward (R. 164, 181). The prime reason being insubordination (R. 181).

Cool's Insubordination

Hedrick ordered Cool to do rafting in a certain manner but Cool refused to do so and ordered Hedrick off the raft (R. 77, 97, 99) and Cool admitted so doing (R. 133-134). Hedrick protested Cool's actions to the Union Business Agent (R. 81).

Cool was elected job steward in 1947 (R. 76, 122-123). It was necessary in the operation of the boom that certain

repair and maintenance work be done on the skids and rollway (R. 166). The boom work and the maintenance work are interchangeable (R. 82). Hedrick ordered some repair work to be done, but Cool refused to let the work proceed (R. 82-83, 167-168). Hedrick assigned one employee from the raft and the two men on the unloader to do some maintenance work on the rollway. Cool said he thought Hedrick was working out of turn on the rollway and Cool ordered the engineer to lower the skid so that the men could not work on the rollway. The men returned to the bunkhouse and did not do any work for about five hours, (R. 82-83, 167-168, 169). At this time there was no understanding or past practice restricting maintenance work when a certain number of logs were handled in a day (R. 84, 85, 87, 169). No other employee or committee member accompanied Cool on this occasion (R. 84).

On another occasion, Hedrick had asked two men to move some steel. They had no objection when Cool, accompanied by a committeeman, approached Hedrick and said, "Well, if you're going to shoot off your big mouth, we just won't do it." The men continued to work but Hedrick in order to avoid the men getting in trouble with the Local union sent the men off the job and the work was stopped (R. 165).

Cool Left Job Without Permission

At about this time, Cool left the job for an hour and a half without obtaining permission (R. 88, 132, 174). This is not denied by Cool (R. 131-132). When Cool returned Hedrick asked to come over to the office and

talk the thing over. Cool refused saying, "Oh Hell, I won't go anyplace with you" (R. 174). Hedrick went to the office with the intention of firing Cool but during the walk decided against it as he figured Cool had to make a living (R. 174).

Other Incidents Between Cool and Hedrick

Hedrick hired a non-union man one day and a union man the next day. The union man went to work a day before the other man. Cool questioned Hedrick on the seniority status of the men and was informed that when the time for layoff came seniority standing of the two men would be settled (R. 130-131, 140).

Cool caused trouble with the crew when he ordered Hedrick off the raft and told Hedrick that the crew would take orders only from the head rafter. Later Cool came to Hedrick and said that the crew refused to take orders from the head rafter (R. 79-80).

One employee quit Respondent's boom because of Cool (R. 81).

Cool stopped Hedrick "pike pole pushing" on numerous occasions. Cool as a job steward had the right to stop this work by Hedrick. Hedrick knew this and made no objection as all other union stewards had stopped him (R. 90, 173, 182).

Respondent's Relations With the Union

Hedrick rehired Ernest Brazeau and Buehl Patterson, both of whom had been active in union matters (R. 164).

Brazeau had been a committee man (R. 164). Hedrick was an old union man and had been very active in union affairs holding the position of job steward and Secretary (R. 162). Though Hedrick was quite a profficient "cusser", he denies making any malicious statements against the Union (R. 176, 183). Respondent has co-operated with the union and tried to keep things going harmoniously (R. 188). Respondent has had satisfactory union relations and this is the first unfair labor practice charge against Respondent (R. 194). Respondent has agreed to consent elections in many union negotiations and has many Union shop clauses in its union contracts (R. 193).

Respondent's motives and intent are recognized by the Board in its supplemental order which states, "We are not persuaded, upon this record, that the Respondent has demonstrated a general intent to defeat self organization and an attitude of opposition to the purposes of the Act. We are particularly mindful in this regard of the Respondent's past amicable relations with this and other unions and the fact that the Respondent has been dealing with the union under a collective bargaining agreement" (R. 49).

Respondent's Refusal to Rehire Cool

During the summer of 1948, Cool telephoned Hedrick and asked him for a job. Hedrick told him there was no work available (R. 18, 92, 137-138). In September, 1948, Hedrick asked the Business Agent if there was a boom man available (R. 92, 111-112, 117, 162). The union offered Cool (R. 92, 111, 162). Hedrick refused

to hire Cool but did hire E. W. Fromong (R. 93) who told Hedrick that he had had experience in boom work (R. 93). Fromong was recommended to Hedrick by a boom man as a boom man (R. 99).

Following the refusal to hire Cool, the Union, in accordance with its contract, filed a formal grievance (R. 27, 113-114) and meetings were held (R. 150). At the final meeting Respondent's representatives said that they "would hire whoever they saw fit," and if the Union was not satisfied it could file charges (R. 114). The unfair labor practice charge was then filed.

1. The findings of the Board, not supported by substantial evidence, are not entitled to consideration. *Appalachian Electric Power Co. v. N.L.R.B.* (4th C.), 93 F. 2d 985, 989 (1938); *N.L.R.B. v. Thompson Products* (6th C.), 97 F. 2d 13, 15 (1938); *Consolidated Edison Co. v. N.L.R.B.*, 305 U. S. 197, 59 S. Ct. 206; *N.L.R.B. v. Kopman-Woracek Shoe Co.* (8th C.), 158 F. 2d 102, 108 (1946); *N.L.R.B. v. William Davies Co.* (7th C.), 135 F. 2d 179, 183 (1943).

2. Inasmuch as Cool was not rehired for cause, the Board had no authority to require his employment, with pay for the period of non-employment. *N.L.R.B. v. Scullin Steel Co.* (8th C.), 161 F. 2d 143, 151 (1947); *N.L.R.B. v. William Davies Co.* (supra); *Loveman, Joseph & Loeb v. N.L.R.B.* (5th C.), 106 F. 2d 769, 771 (1945).

ARGUMENT

The following facts are admitted:

Hedrick ordered Cool to do rafting in a certain manner but Cool refused to do so and ordered Hedrick off the raft (R. 77, 97). Cool admitted so doing (R. 98, 99, 133-134). Hedrick protested Cool's actions to the Union Business Agent (R. 81).

There is no question but that the employer has the right to direct the work and a refusal on the part of the employee to take such reasonable direction is grounds for discharge. *N.L.R.B. v. Scullin Steel Co.* (8th C.), 161 F. 2d 143, 151 (1947); Cf. *N.L.R.B. v. Montgomery Ward & Co.* (8th C.), 157 F. 2d 486, 496 (1946); *N.L.R.B. v. Sands Mfg. Co.* 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682 (1939).

Shortly after Cool returned to work in 1947, he was elected job steward (R. 76, 122-123). It was necessary in the operation of the boom that certain repair and maintenance work be done (R. 166). Boom work and the maintenance work are interchangeable (R. 82). Hedrick ordered some maintenance work to be done, but Cool refused to let the work proceed (R. 82-83, 167-168). Hedrick assigned one employee from the raft and the two men on the unloader to do some maintenance work on the rollway. Cool said he thought Hedrick was working out of turn on the rollway and Cool ordered the engineer to lower the skid that the men could not work on the rollway. The men returned to the bunkhouse and did not do any work for about five hours (R. 82-83, 167-168, 169). At this time there was no understanding or past practice restricting maintenance work when a certain

number of logs were handled in a day (R. 85, 87, 169). No other employee or committee member accompanied Cool on this occasion (R. 84).

The refusal to do the work assigned was ground for discharge and therefore the refusal to reinstate was not an unfair labor practice. *Firth Carpet Company v. N.L.R.B.* (2nd C.), 129 F. 2d 633 (1942).

On another occasion, Hedrick had asked two men to move some steel. They had no objection. Cool, accompanied by a committeeman approached Hedrick and said, "Well, if you are going to shoot off your big mouth, we just won't do it." The men continued to work but Hedrick in order to avoid the men getting in trouble with the Local Union sent the men off the job and the work was stopped (R. 165).

See *Firth Carpet Company v. N.L.R.B.*, supra.

Cool walked off the job without permission (R. 88, 131-132, 174).

Walking off the job without permission is ground for discharge. *Arnolt Motor Company*, 68 N.L.R.B. 868 (1946); *E. I. Du Pont de Nemours & Company*, 62 N.L.R.B. 816 (1945); *Central Wisconsin Motor Transport Co.*, 89 N.L.R.B. No. 143; 26 L.R.R.M. 1105.

The board makes some point of Respondent's failure to discharge Cool at the time of his insubordination and overstepping his authority. Such acquiescence on the part of Respondent did not require it to acquiesce indefinitely "and a decision not to do so does not necessarily reflect anti-union motives." *Vogue-Wright Studios*, 76 N.L.R.B. 773 (1948).

The case closest to the one before the Court is *The Timken Roller Bearing Company*, 60 N.L.R.B. 852 (1945). There the employee quit. He had been one of the organizers of the local union and was a member of the grievance committee. He was absent from work without notice to discuss grievances. Later the employee applied for work and was refused because of low production and disciplinary reports in employee's file despite the fact that employer needed grinders and seldom received applications from experienced grinders. At the same time employer was refusing the ex-employee's application, it accepted that of an inexperienced woman as a grinder.

The Trial Examiner said: "The Board's theory was that, since the employee's record had apparently not been bad enough to result in his discharge, and since employer needed and was hiring inexperienced grinders for want of experienced grinders, an inference should be drawn that the employee was refused re-employment because of his union activities. It is clear that employer alone made the decision not to re-employ the employee and that it was made on the basis of the information in the employment file and not on the employee's record or activities thereof. The Trial Examiner finds that the employee was refused re-employment because of his record and not because of his union membership or activities."

Footnote: (There is no allegation in the complaint and no showing that the employed had any animosity toward the Union. On the contrary, the

absence of any independent Sec. 8 (1) evidence and the respondent's ready recognition of the local as the representative of its members indicates otherwise." Petition dismissed, affirmed by Board.

An even stronger case involving discriminatory refusal to hire is that of *Firestone Tire & Rubber Company*, 67 N.L.R.B. 585 (1946), but the Board held that there was no unfair labor practice.

Employer checked applicant's former employers and was told that the employee would not be re-employed because he was a member of the union. Employee's unionism was discussed with prospective employer. Employer made extensive investigation of employee's qualifications before refusing to hire him.

Board said, "The burden was on Counsel for the Board to prove that employer was discriminately motivated in refusing to employ applicant rather than on employer to prove the opposite. * * * Employee had employed other union members and the record is devoid of evidence pointing to an anti-union animus on the part of employer."

The Trial Examiner makes some issue of the fact that an inexperienced man was hired to fill the vacancy for which the union had offered Cool (R. 18). Under a similar fact situation the Court in *N.L.R.B. v. William Davies Co.*, supra, at page 183 in overruling a Board decision found that where an experienced union man had been discharged for cause, and upon application for re-employment the experienced man was refused and an inexperienced man hired, and where there was no discrimination in the discharge of the union man, held

that since there was no discrimination in the discharge, there was no substantial evidence of discrimination in the refusal to rehire.

Yet the Board held that Respondent's refusal to employ Cool was motivated by a purpose to interfere with the employees' right to organize, and to discourage membership in a labor organization.

What could possibly be an adequate reason not to hire a person if the foregoing does not meet the test?

Our view of this proceeding is buttressed by the Amendment of Section 10 (c) of the Act which reads: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

As stated in the *House Miscellaneous Reports, III, 80th Congress, 1st Session, Report No. 510, pg. 39, Conference Report*:

"Furthermore, in Section 10 (c) of the amended Act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity." And at Page 55, "The House Bill also included, in Sec. 10 (c) of the amended Act, a provision forbidding the Board to order reinstatement or back pay for any employee who has been suspended or discharged, unless the weight of the evidence showed that

the employee was not suspended or discharged for cause. * * * The conference agreement * * * simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for communist activities, or for other cause (See *Wyman-Gordan v. N.L.R.B.*, 153 F. 2d 480) will not be entitled to reinstatement."

The House Labor Committee Report states:

"Section 10 (c) This section, dealing with remedies the Board may prescribe, contains these three significant changes. * * *

"C. A third change forbids the Board to reinstate an individual unless the weight of the evidence shows that (modified in Act, to omit reference to 'weight of the evidence') the individual was not suspended or discharged for cause. In the past, the Board, admitting that an employee was guilty of gross misconduct, nevertheless frequently reinstated him, 'inferring' that, because he was a member or an official of a union, this, not his misconduct, was the reason for the discharge.

"*Matter of Wyman-Gordan Company*, 62 N.L.R.B. 561, is typical of the Board's attitude in such cases. In that case, the employer discharged an active union member for interrupting other employees at their work on materials for war. The Board reinstated the man with back pay. Company appealed. * * * Declaring that 'any

interference, slight or moderate,' justified discharge, the Court said (17 L.R.R. 823) :

'If it were not before us in print, we would find it difficult to believe that any responsible person or agency would resort to such asinine reasoning. The charge made in Sec. 10 (e) on this subject is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules and engage in incivilities and other disorders and misconduct. The bill will require that the new Boards rulings shall be consistent with what the Supreme Court said in upholding the Act, that it (the Act)—does not interfere with the normal right of the employer to select its employees or to discharge them, * * * the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than * * * intimidation and coercion. (*N.L.R.B. v. Jones & Loughlin Steel Corp.*, 301 U. S. 1, 45-46).'

"The Board may not 'infer' an improper motive when the evidence shows cause for discipline or discharge." *House Labor Committee Report, House Miscellaneous Reports, II, 80th Congress, 1st Session, Report No. 245, pages 42 and 43.*

It is obvious that Congress intended a change in Board Administration; or, otherwise, there would have been no change in the law. The law was changed. Congress obviously intended that any employer who had reasons, not connected with Union activity, should not be ordered to reinstate a discharged employee. But we are not faced with a discharge case. It is a refusal to employ. Our position is that much stronger. In the *Sands Mfg.*

Co. case, 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682, the Supreme Court upheld the action of an employer, faced with a strike, calling on Union for replacements.

In the last cited case there was no explanation for the conduct of the employer in deliberately using a Union for a hiring agency. The Supreme Court approved it.

Here we have a person who refuses to take reasonable direction from his superior, stopped the job on two occasions, caused one man to quit the boom, caused trouble by demanding that orders to the men be directed through the head rafter, and walked off the job without permission. But the Board writes Respondent was actuated by an anti-union purpose. The same Board ruled Respondent's punishment should be lightened because, "* * * the Respondent has not demonstrated a general intent to defeat self-organization and an attitude of opposition to the purposes of the Act. We are particularly mindful in this regard of the Respondent's past amicable relations with this and other unions and the fact that Respondent has been dealing with the union under a collective bargaining agreement" (R. 49).

CONCLUSION

We believe that the Board properly evaluated this case when it acquitted the Respondent of anti-union bias through its supplemental order. If cause for non-employment is not found in any one of the following:

Cool's refusal to take orders from his superior, Cool's unwarranted stopping of the job on two occasions, Cool caused one man to quit the boom, Cool caused trouble by

demanding that orders to the men be directed through the head rafter and Cool walked off the job for an hour and a half without permission.

Cool was refused employment because of insubordination and overstepping his authority.

What constitutes cause?

Respectfully submitted,

RICHARD R. MORRIS

JARVIS B. BLACK

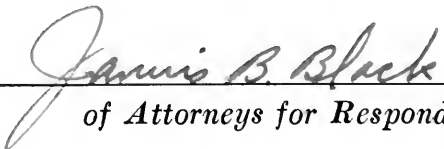
Attorneys,

Leadbetter Logging &
Lumber Company.

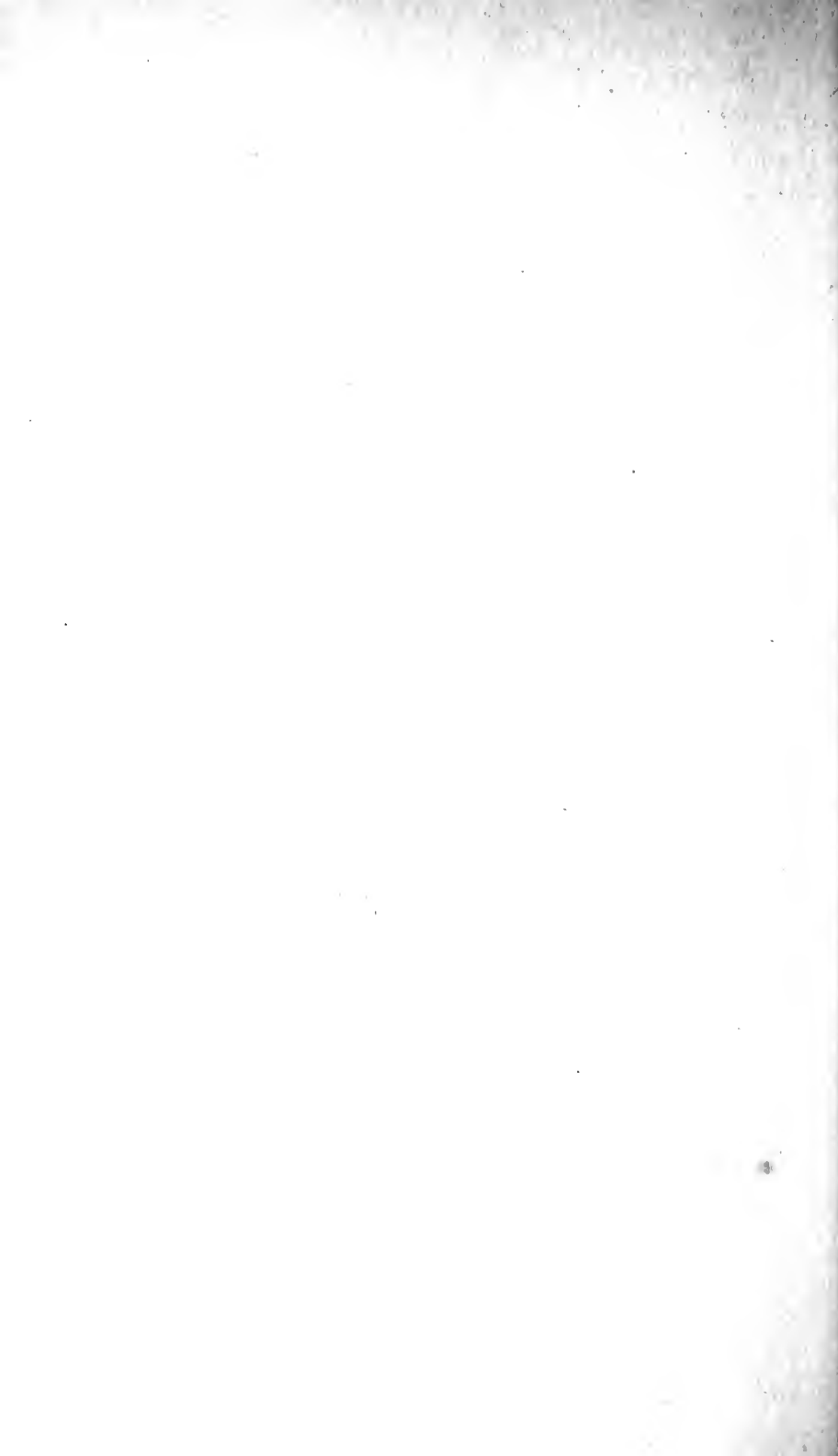
STATE OF OREGON }
County of Multnomah } ss.

I, Jarvis B. Black, one of attorneys for Respondent, do hereby certify that I have prepared the foregoing copy of Respondent's Brief and have carefully compared the same with the original thereof; and that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the 26th day of January, 1951.



of Attorneys for Respondent



No. 12703

United States
Court of Appeals
for the Ninth Circuit.

UNION PACKING COMPANY,
Appellant,
vs.
CARIBOO LAND & CATTLE CO., LTD.,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

JAN - 3 1951

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

BENJAMIN W. SHIPMAN,

511 Pacific Mutual Bldg.,
523 West Sixth St.,
Los Angeles 14, Calif.

For Appellee:

FREDERICK W. MAHL, JR.,

610 Rowan Bldg.,
458 S. Spring St.,
Los Angeles 13, Calif.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 10617-C

CARIBOO LAND & CATTLE CO., LTD., a corporation,

Plaintiff,

vs.

UNION PACKING COMPANY, a corporation,
Defendant.

COMPLAINT FOR MONEY

Comes now Cariboo Land & Cattle Co., Ltd., plaintiff above named and for cause of action against Union Packing Company, defendant above named, alleges:

I.

The ground upon which the jurisdiction of this Court depends is diversity of citizenship. Plaintiff is, and at all of times herein mentioned was, a corporation organized and existing under the laws of the Province of British Columbia, Dominion of Canada and a citizen thereof. Defendant is, and at all of the times herein mentioned was, a corporation organized and existing under the laws of the State of California and a citizen thereof and maintaining its principal office and place of business in the County of Los Angeles, State of California. [2]

II.

At all of the times herein mentioned, plaintiff

was engaged in the business of breeding and raising beef cattle upon its ranches near Williams Lake, British Columbia, Canada, and defendant was engaged in the cattle slaughtering and meat packing business in the County of Los Angeles, State of California.

III.

On or about the 10th day of September, 1948, plaintiff and defendant entered into an oral contract pursuant to which the parties agreed that plaintiff would sell and deliver to defendant in the County of Los Angeles, State of California, two hundred and fifty-four (254) head of cattle and that defendant would purchase the same and pay to plaintiff therefor in the said County immediately after defendant had slaughtered the same a sum of not less than forty-six (\$.46) cents for each pound of dressed beef defendant processed therefrom, but in the event at the time defendant slaughtered the cattle the market price of any of the grades of dressed beef processed therefrom exceeded forty-six (\$.46) cents a pound, defendant would pay plaintiff such market price upon such grades. Defendant further agreed pursuant to said contract to pay to plaintiff in addition to the foregoing and as part of said purchase price two (\$.02) cents a pound for the difference between the weight of said cattle at the time of delivery to defendant and the weight of the dressed beef defendant processed therefrom (in the meat packing industry and hereinafter called "offal").

IV.

Pursuant to said contract, plaintiff delivered said cattle to defendant in the said County on or about October 8, 1948, and thereafter defendant slaughtered the same. Plaintiff has performed all of the terms and conditions of said contract on its part to be performed. [3]

V.

Plaintiff does not know and has no means of ascertaining when defendant slaughtered said cattle, the aggregate number of pounds of dressed beef defendant processed therefrom, the number of pounds of the various grades of dressed beef defendant processed therefrom, the market price at the time defendant slaughtered said cattle of the various grades of dressed beef defendant processed therefrom, or the number of pounds of offal defendant processed from said cattle. Said facts and each of them are well known to defendant.

VI.

Although demand has been made upon defendant therefor, defendant has failed and refused to account to plaintiff for the sums due plaintiff under and pursuant to said contract. Plaintiff has received on account thereof the sum of fifty one thousand three hundred dollars and seventy cents (\$51,300.70) and there is now due and owing and unpaid under said contract from defendant to plaintiff a sum in excess thereof, the amount of which is unknown to plaintiff but well known to defendant, together with interest thereon.

Wherefore, Plaintiff prays judgment against defendant as follows:

(1) That defendant be ordered to account to plaintiff and to this Court for the sum now due and owing plaintiff under said contract, and

(2) For judgment in the amount of the sum so found to be due and owing from defendant to plaintiff with interest thereon from the date the same became due until paid, and

(3) For such other and further relief as may be just in the premises.

/s/ PATRICK DRAKE, JR.,
Attorney for Plaintiff. [4]

State of California
County of Los Angeles—ss.

Ben Jaffe, being sworn, says: That he is the Vice President of Cariboo Land & Cattle Co., Ltd., a corporation, the above named plaintiff, and is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

/s/ BEN JAFFE.

Subscribed and sworn to before me on Nov. 21, 1949.

[Seal] /s/ BENJ. H. FLESHER,
Notary Public in and for
Said County and State.

My Commission Expires Dec. 8, 1950.

[Endorsed]: Filed November 28, 1949. [5]

[Title of District Court and Cause.]

ANSWER

Comes now the Union Packing Company, the defendant in the above entitled action, and answering plaintiff's complaint on file, herein alleges as follows:

I.

Answering Paragraph I of said complaint, defendant admits that it is a corporation and is a citizen of California, with its principal place of business in the County of Los Angeles.

The defendant has no information as to the status of the plaintiff herein, and for lack of such information or belief denies the other allegations in said Paragraph I.

II.

Defendant denies the allegations of Paragraph III and IV of plaintiff's complaint. [6]

III.

Answering Paragraph V of plaintiff's complaint,

defendant denies that it has purchased any cattle from plaintiffs, the payment for which depended upon the slaughter of the cattle or the dressed beef processed therefrom or the number of pounds or grades of dressed beef processed therefrom or the market price at the time defendant slaughtered cattle of grades of dressed beef or pounds of offal therefrom, and, therefore, denies the allegations of said Paragraph V.

IV.

Defendant denies the allegations of Paragraph VI.

Wherefore, defendant prays that plaintiff take nothing by its complaint, that defendant may have its costs and such other relief as the court may find just and proper.

/s/ BENJAMIN W. SHIPMAN,
Attorney for Defendant
Union Packing Company,
a corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed January 20, 1950. [7]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 20th day of June, 1950, before the above entitled Court sitting without a jury, a jury having been waived, Honorable James M. Carter, Judge presiding, Frederick W. Mahl, Jr., appearing for the plaintiff, and Benjamin W. Shipman, for the defendant; evidence both oral and documentary having been introduced and the cause submitted for decision, the Court now makes its Findings of Fact as follows:

I.

Plaintiff is, and at the time of the filing of the complaint, was a corporation organized and existing under the laws of the Province of British Columbia, Dominion of Canada, and a citizen thereof, and the defendant is, and at the time of the filing of the complaint herein was a corporation organized and existing [15] under the laws of the State of California, and a citizen thereof, and maintaining its principal office and principal place of business in the County of Los Angeles, State of California.

II.

During the entire year 1948, plaintiff was engaged in the business of breeding and raising beef cattle upon its ranches near Williams Lake, British Columbia, Canada, and defendant during said time was engaged in the cattle slaughtering and meat packing business in the City of Los Angeles, California.

III.

During the entire year 1948, Mr. John Wade was and now is President, Mr. Ben Jaffe was and now is Vice President and Mr. Ray Swanson, then was General Manager of the plaintiff corporation, and Mr. Adolph Miller then was and now is President and General Manager of the defendant corporation.

IV.

In the month of May or June, 1948, said Wade, Swanson and Miller had a conversation during which said Miller stated that he would be interested on behalf of defendant in purchasing the type of cattle plaintiff was raising and said Wade stated that he would get in contact with Miller in August or September, 1948, when plaintiff's cattle would be ready for sale.

V.

On September 8, 1948, the said Wade, acting for and on behalf of plaintiff, orally advised said Miller that plaintiff then had approximately 250 head of cattle which would shortly be ready for shipment and said Miller, acting for and on behalf of defendant, orally advised said Wade that defendant would pay to plaintiff as purchase price of approximately 250 head of cattle delivered in Los Angeles, California, a minimum of 46c for each pound of dressed beef plus 2c for each pound of offal processed from said cattle. [16]

VI.

On September 10, 1948, said Wade, acting for and on behalf of plaintiff, orally advised said Miller

that approximately 250 head of cattle would be ready for sale before October 1, 1948, and requested said Miller to confirm defendant's offer to purchase the same referred to in Finding V hereof and said Miller, acting for and on behalf of defendant, then orally stated to said Wade that defendant would pay to plaintiff for approximately 250 head of said cattle delivered to defendant in Los Angeles, California, a minimum purchase price of 46c for each pound of dressed beef plus 2c for each pound of offal processed from said cattle, that such was to be regarded by plaintiff as a firm commitment of defendant and said Miller at said time, acting as aforesaid, requested plaintiff to ship approximately 250 head of cattle to defendant at Los Angeles, California.

VII.

The term "offal" as used in the business of breeding and raising beef cattle and in the slaughtering and meat packing business means the residue of the animal after extracting from it the dressed beef.

VIII.

Between September 24, 1948 and September 27, 1948, there was a telephone conversation between said Swanson, then acting for and on behalf of plaintiff and who was then at Williams Lake, British Columbia, Canada, and said Miller, who was then in Los Angeles, California, at which time said Miller, acting for and on behalf of defendant, advised said Swanson that defendant had a deal respecting approximately 250 head of plaintiff's cattle

and then requested plaintiff, through said Swanson, to send approximately 250 head of cattle to Los Angeles, California, consigned to defendant.

IX.

In reliance upon the statements of said Miller as found [17] in Findings V and VI hereof, and as confirmed by said Miller as found in Finding VIII hereof and pursuant to the request of said Miller that plaintiff send approximately 250 head of cattle to defendant at Los Angeles, California, as found in Finding VIII hereof, plaintiff the night of the conversation found in Finding VIII hereof shipped out of Williams Lake, British Columbia, Canada, 248 head of cattle to Vancouver, British Columbia, en route to defendant at Los Angeles, California.

X.

On September 28, 1948, at 10:30 o'clock A.M. of said day, said Swanson, acting for and on behalf of plaintiff, sent a telegram to said Miller addressed to him at Union Packing Company, Los Angeles, California, advising said Miller that ten carloads of cattle were being sent that day, which said telegram the said Miller received in due course of transmission.

XI.

No officer, agent or employee of defendant communicated with any officer, agent or employee of plaintiff between the time of the telephone conversation found in Finding VIII hereof and one or two

days after September 28, 1948, when said Swanson met with said Miller at the latter's office in Los Angeles, California.

XII.

In reliance upon the statements of said Miller as found in Findings V and VI hereof and as confirmed by said Miller as found in Finding VIII hereof and pursuant to the request of said Miller that plaintiff send approximately 250 head of cattle to defendant at Los Angeles, California, as found in Finding VIII hereof, plaintiff sent 248 head of cattle consisting of ten carloads from Vancouver, British Columbia, Canada, consigned to defendant at Los Angeles, California.

XIII.

Plaintiff transported said cattle from Williams Lake, British Columbia, to Vancouver, British Columbia, Canada on the [18] Pacific Great Eastern Railroad and from Vancouver, British Columbia, to Los Angeles, California, on the Northern Pacific Railroad and the Southern Pacific Company which was the fastest and best means of transporting said cattle from Williams Lake, British Columbia, Canada, to Los Angeles, California. Said cattle left Vancouver, British Columbia, for Los Angeles, California, on September 29, 1948.

XIV.

It is the custom and practice in the cattle breeding and raising business when cattle are shipped to fulfill an offer to purchase the same to consign

the cattle directly to such purchaser. It is further the custom in said business when cattle are shipped for sale upon the open market to consign them to the shipper at the point of destination.

XV.

In reliance upon the statements of said Miller as found in Findings V and VI hereof and as confirmed by said Miller as found in Finding VIII hereof and pursuant to the request of said Miller that plaintiff send approximately 250 head of cattle to defendant at Los Angeles, California, as found in Finding VIII hereof, plaintiff expended to transport said cattle from Vancouver, British Columbia, to Los Angeles, California, the sum of \$6,327.12 together with the sum of \$3,822.00 for U. S. Custom duty, or a total sum of \$10,149.12.

XVI.

At all times during the months of September and October, 1948, the said Miller knew that in order to transport said cattle from British Columbia, Canada, to Los Angeles, California, it would be necessary for plaintiff to expend large sums of money for transportation and U. S. Custom duty.

XVII.

One or two days after September 28, 1948, and prior to October 6, 1948, said Swanson met with said Miller in Los Angeles, [19] California, at the latter's office, at which time said Miller, acting for and on behalf of the defendant stated to said Swanson that defendant had no contract or arrangement

with plaintiff for the purchase of said cattle and at all times thereafter has denied that defendant had any contract or arrangement for the purchase of said cattle. At said time one Mel Hart, an agent and employee of defendant acting for and on behalf of the defendant and in pursuance to instructions of said Miller, caused the delivery of said cattle to be diverted from the stock yards of the defendant to the Union Stock Yards at Los Angeles, California. The said Union Stock Yards are not owned or controlled by defendant Union Packing Company and is a place where a number of cattle commission firms, including Southwest Commission Company, carry on their business.

XVIII.

Said 248 head of cattle arrived at Los Angeles, California, on Wednesday, October 6, 1948, and through error of the Southern Pacific Company were unloaded from the cars at the stock yards of Southern Pacific Company in Los Angeles, California. The said cattle were then transported to the Union Stock Yards in Los Angeles, California, pursuant to the diversion ordered by the defendant referred to in Finding XVII hereof. Upon the arrival of said cattle at Los Angeles, California, defendant refused to accept delivery of the same.

XIX.

During the months of September, 1948 and October, 1948, the regulations of the U. S. Department of Agriculture required that cattle coming into

the United States from Canada under the circumstances here involved be slaughtered within fourteen days after their entry into the United States. The said cattle entered the United States September 29, 1948, and by reason of said regulations it was required that they be slaughtered on or before October 13, 1948. The cattle required resting and feeding and by [20] reason thereof could not be shown for sale for two days after their arrival at Los Angeles, California, on Wednesday, October 6, 1948; the Union Stock Yards did no business on Saturday, October 9, 1948 and Tuesday, October 12, 1948, was a legal holiday in the State of California. By reason of the foregoing and in order not to be in violation of said regulations and not to incur the penalties thereof, plaintiff necessarily permitted defendant to divert said cattle as found in Finding XVII hereof and to do the other acts hereinafter found in Finding XX.

XX.

At the time said 248 head of cattle arrived in the Union Stock Yards, Los Angeles, California, said Miller, acting for and on behalf of defendant, requested one Paul F. Hill, who was then the owner of the Southwest Commission Company, to procure bids from other meat packers for the purchase of said cattle. Said Hill procured such bids and the highest so bid for said cattle was 21c per pound live weight which fact said Hill communicated to said Miller and said Miller thereupon agreed for and on behalf of the defendant to pay and defendant did pay 21½c per pound live weight for said

cattle. Defendant transported said cattle from Union Stock Yards to the stock yards of the defendant in Los Angeles, California, where defendant slaughtered them on October 12, 13, 14 and 15, 1948.

XXI.

The live weight of said cattle at the time they were delivered to defendant as found in Finding XX hereof was 269,620 pounds. Accordingly, in purchasing said cattle for 21½¢ per pound live weight, defendant paid \$1,348.10 more for said cattle than the best bid of other packers for the same.

XXII.

Between the time of the conversation between said Swanson and said Miller, as found in Finding VIII hereof, and the conversation [21] between said Swanson and said Miller in Los Angeles, California, as found in Finding XVII hereof, the prices at which meat packers and wholesalers in Los Angeles, California, were able to sell dressed beef had declined and said prices at said last mentioned time were lower than they were at the time of the conversations between said Miller and said Wade as found in Findings V and VI hereof.

XXIII.

Prior to October 4, 1948, defendant had contracts to sell to the United States Government 200,000 pounds of dressed beef. Effective as of October 4, 1948, and before the arrival of said cattle in Los Angeles, California, on October 6, 1948, the United

States Government gave defendant notice of the cancellation of said contracts.

XXIV

Defendant denied the existence of any contract or arrangement with plaintiff respecting said cattle as found in Finding XVII by reason of the decline in prices as found in Finding XXII hereof and defendant by reason of said decline in prices and by reason of the cancellation of the contracts with the United States Government as found in Finding XXIII hereof, refused to accept delivery of said cattle upon their said arrival at Los Angeles, California.

XXV.

Plaintiff performed all of the terms and conditions of the contract for the sale of said cattle to defendant on its part to be performed; and defendant by disavowing said contract and refusing to accept delivery of said cattle and refusing to pay the agreed price thereof violated its contract with plaintiff.

XXVI.

The live weight of said 248 head of cattle when received by defendant was 269,620 pounds. Defendant processed 148,015 pounds [22] of dressed beef from said cattle. In slaughtering cattle there is a loss of three per cent of the live weight of the cattle. Plaintiff has received the sum of \$57,850.17 for said cattle and no more. The sum due from defendant to plaintiff was \$70,357.22, of which the sum of \$57,850.17 was paid as aforesaid leaving a balance due

from defendant to plaintiff in the sum of \$12,507.05, computed as follows:

Live weight of 248 head of cattle	
when received by defendant.....	269,620 pounds
Loss of weight due to shrinkage in	
slaughter (269,620 x .03).....	8,088.6 pounds
Live weight less shrinkage.....	261,531.4 pounds
Weight of dressed beef.....	148,015 pounds
Weight of offal.....	113,516.4 pounds
Weight of dressed beef.....	148,015 pounds
Agreed minimum price per pound	
of dressed beef.....	\$.46
Due under agreement for dressed	
beef	\$ 68,086.90
Weight of offal.....	113,516.4 pounds
Agreed price per pound of offal....	\$.02
Due under agreement for offal....	\$ 2,270.32
Due under agreement for dressed	
beef	\$ 68,086.90
Due under agreement for offal....	2,270.32
Total due under agreement.....	\$ 70,357.22
Received by defendant on account..	57,850.17
Balance Owing Under Agreement..	\$ 12,507.05

XXVII.

Defendant completed slaughtering said 248 head of cattle on October 15, 1948, at which time the said sum of \$12,507.05 was due from defendant to plaintiff. [23]

Conclusions of Law

As Conclusions of Law from the foregoing facts, the Court finds:

I.

Defendant, acting by and through its duly authorized President and General Manager, did, on September 8, 1948, and again on September 10, 1948, orally offer to purchase from plaintiff beef cattle to number approximately 250 head to be ready for shipment from plaintiff's ranches in British Columbia, Canada, before October 1, 1948, for a minimum purchase price delivered to defendant at Los Angeles, California, of 46c for each pound of dressed beef and 2c for each pound of offal defendant processed therefrom.

II.

Plaintiff accepted the said offer and performed all of the terms and conditions thereof by shipping 248 head of cattle from British Columbia, Canada, on September 29th, 1948, consigned to defendant at Los Angeles, California, and incurred expense and financial obligation in connection with such shipment. The said cattle as originally consigned by plaintiff to defendant would have been delivered to defendant at Los Angeles, California, had defendant not caused them to be delivered elsewhere.

III.

The contract resulting from such offer and acceptance is not invalid by reason of not having been written and defendant is estopped to assert such invalidity by reason of the fact that at no time

prior to plaintiff shipping the cattle did defendant cancel or rescind such offer, and by reason of the fact that said offer was open for acceptance by plaintiff at the time plaintiff accepted the same, and by reason of the fact that between September 24, 1948 and September [24] 27, 1948 defendant reaffirmed said offer and requested plaintiff to send the cattle to it at Los Angeles, California, then knowing that it would be necessary for plaintiff to expend money to do so, and the fact that plaintiff did expend money in transporting said cattle to defendant at Los Angeles, California. Defendant's refusal to accept said cattle at Los Angeles, California, and to pay the agreed purchase price therefor constituted a breach of the contract then existing between plaintiff and defendant.

IV.

Plaintiff is entitled to judgment in the sum of \$12,507.05 with interest thereon from October 15, 1948.

Judgment Is Hereby Ordered To Be Entered Accordingly.

Dated: July 25, 1950.

/s/ JAMES M. CARTER,

Judge of the United States
District Court.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 25, 1950. [25]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 10617C

CARIBOO LAND & CATTLE CO., LTD.,
a corporation,

Plaintiff,

vs.

UNION PACKING COMPANY, a corporation,
Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 20th day of June, 1950, before the above entitled Court sitting without a jury, a jury having been waived, Honorable James M. Carter, Judge presiding, Frederick W. Mahl, Jr., Esq., appearing for the plaintiff, and Benjamin W. Shipman, Esq., for the defendant; evidence both oral and documentary having been introduced and the cause submitted for decision, the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised:

Wherefore, by reason of the law and the findings of fact aforesaid, It Is Ordered, Adjudged and Decreed that palintiff do have and recover of and from defendant the sum of \$12,507.05 with interest thereon at the rate of seven per cent (7%) per annum from October 15, 1948, until the date of entry of

judgment in the sum of \$1,556.41 making a total judgment of \$14,063.46, together with plaintiff's costs and disbursements in said action amounting to the sum of \$—— [28]

Dated: July 25, 1950.

/s/ JAMES M. CARTER,

Judge of the United States
District Court.

[Endorsed]: Filed July 25, 1950.

Judgment entered July 25, 1950. [29]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Union Packing Company, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled case, in Judgment Book No. 67, at Page 272, on or about the 25th day of July, 1950, and from the whole thereof.

Dated: August 24th, 1950.

/s/ BENJAMIN W. SHIPMAN,

Attorney for Defendant and Appellant, Union
Packing Company, a corporation.

[Endorsed]: Filed August 24, 1950. [30]

In the United States District Court, Southern
District of California, Central Division

No. 10617-C Civil

CARIBOO LAND & CATTLE CO., LTD., a Cor-
poration,

Plaintiff,

vs.

UNION PACKING COMPANY, a Corporation,
Defendant.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

June 20, 1950

Appearances:

For the Plaintiff:

FREDERICK W. MAHL, JR., ESQ.,
729 Rowan Building,
Los Angeles 13, California.

For the Defendant:

BENJAMIN W. SHIPMAN, ESQ.,
511 Pacific Mutual Building,
Los Angeles 14, California.

The Court: I have read the file and your pre-trial briefs and checked some of the authorities cited. Do you care to make an opening statement?

Mr. Mahl: Yes, if your Honor please.

I think the issues of the case are exceedingly simple. It is our position that there was a very firm contract by which the plaintiff did sell, and the defendant purchased, approximately \$70,000.00 worth of cattle. The issues are as drawn by the pleadings and by the pretrial briefs, as to the making of that contract and the question of the statute of frauds which we feel that this case comes under the exceptions. [4]

* * *

JOHN L. WADE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Mahl:

Q. Mr. Wade, you are now and were during the entire year of 1948 the president of the plaintiff corporation, is that correct? A. I was. [5]

Q. And the plaintiff is a corporation incorporated under the laws of British Columbia?

A. That is correct.

Q. The stock is entirely owned by United States citizens? A. That is correct.

Q. Mr. Ben Jaffe is now and was throughout the year 1948 the vice president of the company?

A. That is correct.

Q. And Mr. Ray Swanson, in 1948 was treasurer of the company, is that correct?

(Testimony of John L. Wade.)

A. That is correct. [6]

* * *

Q. Calling your attention to the months of May or June, 1948, did you have any conversation with Mr. Adolph Miller? A. I did.

Mr. Mahl: Mr. Adolph Miller, it is stipulated, your Honor, is the president and general manager of the defendant corporation, and was in 1948.

Mr. Shipman: I accept that. [7]

* * *

A. Mr. Miller and Mr. Swanson and myself at lunch discussed the feasibility of shipping all of our cattle from Canada to the United States for the American market. Mr. Miller stated he would be interested in the purchase of our type of cattle, as we explained to him what they were.

* * *

And we told him that we would get in touch with him when the cattle were in condition to be killed, that is, towards the fall.

Q. (By Mr. Mahl): When did you next talk with Mr. Miller?

A. On or about September 8, 1948.

* * *

Q. Will you kindly relate that conversation with Mr. Miller?

Mr. Shipman: If the conversation has to do with the making of an alleged contract, may it please the court, [8] simply for the purpose of the

(Testimony of John L. Wade.)

record may I enter the objection that it is irrelevant, immaterial and incompetent as it appears from the statements made before your Honor that it is a transaction in excess of the statutory provisions.

Mr. Mahl: I assure your Honor that this conversation has to do with the contract.

The Court: Objection overruled.

The Witness: I told Mr. Miller that Mr. Swanson had phoned me from the ranch and wanted to know if he was still interested in the purchase of the cattle that we discussed bringing down to him in May, and he said he was, and I asked him what the market was in Los Angeles and he said, "I will pay you 46 cents per pound plus 2 cents for the offal, and grade from commercial up.

Mr. Mahl: May I interrupt just a moment, Mr. Wade?

Q. 46 cents per pound of what product?

The Court: And to grade from commercial up. Does that have a meaning in the business in which you are engaged?

The Witness: Yes, sir, A is top meat, B is second, Commercial is third. So by grading from Commercial up it is a different grade than commercial utility. So by grading from commercial up each carcass would be graded commercial or B [9] or A, but the worst that it would be would be commercial.

The Court: "C" is the same as commercial?

The Witness: Well, it would be the same. We call it commercial. The statement was "commercial."

(Testimony of John L. Wade.)

Q. (By Mr. Mahl): In other words, if we understand you correctly, the beef would not be graded, according to Mr. Miller's conversation with you, below commercial grade? A. That is correct.

* * *

Q. Now will you continue with the conversation at that time?

Mr. Shipman: Just a moment. Mr. Reporter, may I have the question of counsel?

(The question referred to was read by the reporter as follows:

* * *

A. I told Mr. Miller that I would get in touch with Mr. Swanson and Mr. Jaffee and that I would contact him later.

Q. Was there anything else in that conversation? [10] A. I don't recall at the moment.

Q. Did you have a subsequent conversation with Mr. Miller? A. I did.

Q. When was that?

A. On or about September 10, 1948.

* * *

Q. Will you tell us what was said at that conversation? What was that conversation?

A. I told Mr. Miller that my associate, Mr. Jaffe, was going up to the ranch and that I wanted to call him and confirm the conversation I had had with him on September 8th, and I had made a memorandum pad of our conversation at that September 8th meeting, so I referred to that. So I

(Testimony of John L. Wade.)

said, "Well, Adolph, let me understand you clearly. If we ship cattle to you here in Los Angeles you will pay us 46 cents plus 2 cents for the offal and this is a firm commitment?"

He said, "Yes, I can use this type of cattle, I [11] will take them."

I said, "Well, the reason I am calling you back is I want to be sure that I have this commitment before I authorize the shipment of this cattle to Los Angeles."

And he said, "That is all right, son. Send them on down."

He said, "How many will there be?"

I said, "Approximately 250 are ready to go now in this particular shipment, about 10 cars."

He said, "Well, that will be fine. You tell Swanson to send them on down."

* * *

Q. After this conversation, what did you do?

A. I relayed this conversation on to Mr. Jaffe and Mr. Swanson. Then I left Los Angeles.

* * *

Q. Now, Mr. Wade, your shipping point from the ranch is a town called Williams Lake, in British Columbia, is it not? A. That is correct. [12]

* * *

Q. Now did you go to Vancouver?

A. I did.

Q. And about when did you arrive there?

A. September 27, 1948.

(Testimony of John L. Wade.)

Q. And what happened in Vancouver?

A. I met Mr. Swanson about 4:00 a.m., Monday morning, September 27th, at the Georgia Hotel. We got up, had breakfast, went down to where the cattle were being fed and watered——

The Court: This is in Vancouver?

The Witness: Yes, sir.

The Court: They had been sent down to Vancouver?

The Witness: Yes, sir, from Williams Lake.

Q. Proceed.

A. They had some figures on the cost of shipping the cattle to Los Angeles, the customs, the freight, etc., and at that time we estimated it would be approximately \$10,000 that it would cost us to ship them down. And Ray had made a group of figures from this 46 cents and 2 cents for the offal, and had figured out the approximate amount that we would receive under this contract. [13]

Ray made arrangements with one of the forwarding agencies there, Byrnes & Company, one of the Frazier River stock yard people to arrange with the railroad people to ship these cattle to Los Angeles.

I told Ray, I said, "Well, we had better call Adolph and tell him they are en route, or better wire him."

He said, "I just talked to him from Williams Lake and that isn't necessary."

I told him, "We have 250 head of cattle, 10 cars. His yard may be full and his slaughterhouse may

(Testimony of John L. Wade.)

not be able to kill them the day they get there. You had better send Adolph a wire."

He said, "I will."

So I filled out a wire and wired Adolph the evening of the 27th or the morning of the 28th, that the cattle were being shipped that day, which would be on Tuesday.

Q. Did you see the wire before it was sent, Mr. Wade? A. Yes.

* * *

The Clerk: Plaintiff's Exhibit 1 for identification. [14]

* * *

Q. I show you Plaintiff's Exhibit 1 for identification and ask you if that is the wire that you saw that Mr. Swanson sent to Mr. Miller.

A. This is the wire.

Mr. Mahl: We offer this in evidence as Plaintiff's Exhibit No. 1, if the court please.

The Court: Received in evidence.

The Clerk: Plaintiff's Exhibit 1 in evidence.

* * *

Mr. Mahl: It is stipulated, if I understand you correctly, Mr. Shipman, that the expense to the plaintiff company for the transporting of these cattle from Vancouver to Los Angeles, including feed and watering, was the sum of [15] \$6459.47. Is that correct, Mr. Shipman?

Mr. Shipman: I will stipulate that you put in the account sales into evidence.

* * *

(Testimony of John L. Wade.)

The Clerk: Yes. And this document you have just handed me will be Plaintiff's Exhibit 7. [16]

* * *

The Court: I understand that Exhibit 7 is stipulated to.

Mr. Shipman: Yes, your Honor.

* * *

Mr. Mahl: Will you mark this. I merely want the witness to testify that that bill was the expenses that were paid. It appears in the lower right-hand corner.

* * *

The Court: No. 8, is that also one of those stipulated to?

Mr. Mahl: That is the expense for duty, etc.

The Court: Is that stipulated to also?

Mr. Shipman: No objection, your Honor.

The Court: Plaintiff's Exhibit 8 in evidence also. [17]

* * *

Q. Mr. Wade, will you kindly look at plaintiff's Exhibit 7 and tell the court the amount that was expended by your company for bringing the cattle from Vancouver to Los Angeles, exclusive of duty?

* * *

The Court: I take it it is the figure of \$6540.67, is that correct?

Mr. Mahl: There is a second sheet that adds \$8.30 to it, your Honor.

* * *

(Testimony of John L. Wade.)

The Witness: Yes, sir.

The Court: That is what your company paid?

The Witness: Yes, sir. [18]

* * *

Q. I show you Plaintiff's Exhibit 8, Mr. Wade, and ask you if you are able to tell us how much was expended by your company for United States customs in bringing these cattle into this country.

A. \$3822.

Q. So then a total of \$10,478.47 was expended in bringing these cattle to Los Angeles, is that correct?

* * *

The Witness: Yes, sir.

Q. Mr. Wade, these cattle were billed from Vancouver to whom?

A. To the Union Packing Company.

Q. What is the custom in your business in connection with how cattle are billed? [19]

* * *

A. If cattle are sold to a packer, or you have a contract to sell them to a packer, you ship them to the packer. If you ship them to the open market you bill them to yourself, to your company or to the owner of the cattle.

Q. And that is the custom in the cattle business, is that correct? A. That is correct.

Q. Mr. Wade, are you familiar with the regulations of the Department of Agriculture, United States Department of Agriculture, relative to requirements for slaughtering cattle brought in from foreign countries? A. I am.

Q. What are those requirements? [20]

(Testimony of John L. Wade.)

A. If you bring fat cattle into the United States under their regulations, and they are not tested, they must be slaughtered within 12 days from the time they enter the United States from the border. In other words, 12 days from the border.

Q. Were the cattle which were sold here fat cattle? A. Yes.

Q. What do you mean by if they were not tested they must be slaughtered in 12 days?

A. Well, I mean by that that under the regulations if the cattle are tested, t. b. test, tuberculosis tested, and they are brought in as feeder cattle to be fed and grained, and so forth, here, why then that comes under a different regulation.

Q. Were these cattle tested, as you described them? A. No.

* * *

Q. When did these cattle leave Vancouver?

A. On Tuesday, September 28th.

Q. When did they arrive in Los Angeles? [21]

* * *

Mr. Shipman: These freight bills, your Honor, apparently indicate arrival in Los Angeles on the 6th of October. [22]

* * *

The Court: You know they arrived here and it must have been approximately that date?

Mr. Shipman: That is correct.

* * *

(Testimony of John L. Wade.)

Cross-Examination

By Mr. Shipman: [23]

* * *

Q. This meeting in 1948, where was it?

A. I believe at Levy's Grill on South Spring Street.

* * *

Q. At that time were you talking about the purchase by Mr. Miller of any definite quantity of cattle?

A. Well, no, not of any definite quantity, but he was advised as to the number of cattle we would have for sale that fall.

Q. How many cattle were you going to have for sale?

A. We told him approximately a thousand head.

Q. Was there anything said at that time as to when the first cattle would be ready for shipment?

A. Well, we told him that we thought August and September, depending on the grass. In other words, some springs are earlier than others and you get grass faster, and your cattle fatten faster, so it would vary. But we told him August and September.

Q. That conversation then was more in the nature of a conversation regarding general market conditions?

A. General market conditions, but with respect to our shipping cattle to Los Angeles or selling them in Canada. [24]

* * *

Q. Did you tell him that you had no other market for the cattle except Los Angeles?

(Testimony of John L. Wade.)

A. No, I didn't tell him that.

Q. Did you have a market somewhere else?

A. Oh, yes, we had a market in the United States.

Mr. Mahl: May I ask when, Mr. Shipman?

Mr. Shipman: I am speaking of the conversation, still referring to that conversation.

The Witness: Yes, there are cattle markets all over the United States, Mr. Shipman.

Q. (By Mr. Shipman): In relation to the place where you conduct your farming operations, where is the usual market?

A. Well, there is a market in Vancouver, there is a market in Kamloops, there is a market in Williams Lake, there is a market in Calgary. The cattle business is conducted the same as here in the States. We have Swift & Company and Byrnes & Company.

Q. Any market in Seattle?

A. Oh, yes, there is a cattle market in Seattle.

Q. Do you ever ship any cattle to Seattle?

A. No.

Q. Did you ever ship cattle before this to anyone or was this your first crop?

A. No, we had sold cattle prior to this.

Q. Always in Canada? [25]

A. Up to that time. The embargo hadn't been lifted, Mr. Shipman.

Q. There was an embargo at that time?

A. Oh, yes; prior to that time.

Q. When was the embargo lifted?

(Testimony of John L. Wade.)

A. I don't have the date, but it was prior to this time. All during the war there was an embargo. Just when it was lifted, I don't know.

* * *

Q. Do you know whether you made any sales in Canada [26] prior to May of 1948, from that ranch of cattle?

A. Not prior to May of '48; no.

Q. So there were no sales by you from that ranch in Canada prior to this transaction that you allege took place in September of 1948?

A. Yes, there were sales I believe on the 10th of August in 1948.

Q. To Canada or the United States?

A. To Canadian packers. That is an outfit similar to Swift. It is a national meat organization.

Q. That was where?

A. The cattle were sold at the ranch.

Q. If you make sales of cattle to Los Angeles, they have to be transported by freight, don't they, to Los Angeles?

A. Yes, by freight or railroad.

Q. You didn't pay any more freight here than you would have paid had the cattle been sold to anyone else?

A. Well, no. The freight rates are established by the Commission, I presume.

Q. It is the same freight rate?

A. I presume so.

Q. Now in your conversation with Mr. Miller,

(Testimony of John L. Wade.)

the next conversation which was September 8th, that was on the telephone?

A. That is correct. [27]

Q. Where did you call him?

A. At the Union Packing Company, a Jefferson number. I have it on my pad at the office. I don't have it here.

Q. And you talked with him? A. I did.

Q. Did you tell him at that time that you had 250 head ready? A. Yes, I did.

Q. Or was that in the second telephone conversation?

A. No, I told him in the first that Mr. Swanson had called me from the ranch and told me to get in touch with Adolph and to see if he would be interested in this cattle.

Q. And you told him you had 250 head?

A. I said there is about 250 head.

Q. Did you tell him the condition of the cattle?

A. Yes, I did.

Q. Did you tell him when they would be shipped?

A. I beg your pardon?

Q. Did you tell him when they were going to be ready for shipment?

A. I told him in a few days. I didn't give him any date, no.

Q. Did he ask how soon?

A. I don't recall. He may have. I just don't recall whether he asked how soon. I think he asked how many days it [28] would take to get them to Los Angeles, how long the freight train would be

(Testimony of John L. Wade.)

getting here, but as to when I would ship I don't remember any conversation about that.

Q. But he didn't ask in that conversation how long it would take them to come to Los Angeles?

A. Yes.

Q. Did you tell him at that time?

A. I told him I didn't know but I understood about eight or ten days.

Q. In the second conversation made as to the length of time it would take for the cattle to be shipped?

A. No, I don't believe it was repeated. It was asked in one of those conversations.

Q. In the second conversation, was it said when they would be shipped? A. No.

Q. In either one of those conversations was there any statement made as to when the cattle would be shipped?

A. No. He asked me, "How soon will these cattle be ready, John?"

I said, "Certainly before the 1st of October, but I can't tell you exactly when," because Mr. Swanson was up at the ranch and I was in Los Angeles and I didn't have that information.

Q. And he offered you 46 cents a pound? [29]

A. That is correct.

Q. Irrespective of the quality of the cattle?

A. Well, he started with the commercial grade, Mr. Shipman, 46 cents commercial grade, graded up. In other words, if there were A's and B's, what we

(Testimony of John L. Wade.)

call blues and reds in Canada, well then the price in proportion would be higher.

Q. But suppose they were not commercial grade?

A. Well, I told him what type of cattle they were and Mr. Swanson had told him when he was here talking to him in May, and he just made that statement of commercial grade.

Q. When you refer to the conversation with Mr. Swanson, you mean the conversation in May of 1948?

A. Yes. He told him the quality of the cattle that we raised, the type of breeding, etc.

Q. But commercial grade is fat cattle, isn't it, finished cattle? A. Fairly finished.

Q. But Mr. Swanson—neither you nor Mr. Swanson knew at that time whether these cattle would be fat at that time or not, did you?

A. Well, you wouldn't ship them unless they were fat cattle. If they weren't fat cattle you would ship them as feeders.

Q. But would you answer my question?

A. I would be glad to. Will you repeat it? [30]

(The question referred to was read by the reporter as follows:

“Q. But Mr. Swanson—neither you nor Mr. Swanson knew at that time whether these cattle would be fat at that time or not, did you?”)

The Witness: I would say as a grower of beef that we knew it. Yes, we knew by October 1st they would be fat cattle on bunch grass.

(Testimony of John L. Wade.)

Q. (By Mr. Shipman): Mr. Wade, when was the quality of the cattle to be determined, that is, whether they were commercial or better than commercial?

A. When they were slaughtered by Mr. Miller.

Q. And Mr. Miller was to pay you no less than 46 cents a pound? A. That is correct.

Q. Irrespective then of the quality of the cattle?

A. That was the floor, the minimum, that was to be paid.

Q. Will you be good enough to answer my question? Read it again, please.

(The question referred to was read by the reporter as follows:

(Q. Irrespective then of the quality of the cattle?") [31]

The Witness: That is correct.

Q. (By Mr. Shipman): No matter how they graded or what they were?

A. As I said before, there was no other price discussed except 46 cents commercial grade and up.

Q. Then these cattle were to be fat cattle when they arrived in Los Angeles?

A. They were to be good cattle. They weren't grain-fed cattle. There is a lot of difference in different types of fat cattle.

Q. I didn't offer that suggestion. Were they to be fat cattle when they arrived in Los Angeles?

A. I presume so. Yes would be the answer. I don't get your point.

(Testimony of John L. Wade.)

Mr. Mahl: I would suggest, Mr. Wade, that you understand the question. If you don't understand it, say so.

Q. (By Mr. Shipman): If I didn't make myself clear, Mr. Wade, I will be glad to.

A. No, you didn't make yourself clear.

Mr. Shipman: Read the question again.

(The question referred to was reread by the reporter as follows:

“Q. Then these cattle were to be fat cattle when they arrived in Los Angeles?”) [32]

The Witness: Killable cattle or fat cattle. Yes, I would say yes, they were to be killable cattle, not feeder cattle.

Q. (By Mr. Shipman): Did you discuss with Mr. Miller at either of the conversations, either on September 8th or September 10th, how these cattle were to be delivered in Los Angeles?

A. Do you mean what means of transportation? Is that what you mean, Mr. Shipman?

Q. I think my question is quite clear, at least to me it is.

The Court: I do not know what you mean.

Mr. Shipman: Then I beg your pardon.

Q. How were the cattle to be shipped to Los Angeles, in what manner? A. By railroad.

Q. Was the point mentioned from which they were to be shipped by railroad?

A. No, the shortest route possible.

Q. Who was to determine that route?

(Testimony of John L. Wade.)

A. We were to determine it, I presume. He didn't say, ship them this way or that way, just get them to Los Angeles as soon as you can.

Q. So that the manner of shipping was left entirely to you? [33]

A. The matter of routing was left to us; yes.

Q. Did Mr. Miller suggest to you that possibly you would get a better deal—I withdraw that.

Did Mr. Miller suggest to you in either one of these telephone conversations in September of 1948 that you would be better off by shipping the cattle to the Union Stock Yards and not to the Union Packing Company?

A. He didn't at any time to my knowledge ask me to ship anywhere except to the Union Packing Company.

Q. But in those conversations on the 8th and 10th of September, he wanted you to ship the cattle to the Union Packing Company?

A. That is correct.

* * *

Q. Now there had been some account sales introduced here——

I am a little confused on that, may it please the court. Are those in evidence or not, the account sales, that is, the Southwest Commission Company?

The Clerk: No. 7?

Mr. Shipman: No. 7 and 8.

The Court: Nos. 7 and 8 are in evidence.

Q. (By Mr. Shipman): Now, in addition to the

(Testimony of John L. Wade.)

remittance on this cattle from the Southwest Commission Company, after they were sold did you file any claim against the railroad company for the [34] condition of the cattle?

A. I never filed any.

Q. By reason of delay in transit?

A. I never filed any claim. I think the company did.

Q. As I understand it, you are here as president of the company, are you not?

A. That is correct. But you asked about me personally filing any.

Q. I didn't ask you whether you personally filed one.

A. The company filed a claim, yes.

Q. On account of the condition of the cattle?

A. Because of unloading them at the wrong yards here in Los Angeles. We made a claim. I think the claim is here.

Q. And that affected the condition of the cattle?

A. Any delay affects the condition of cattle, Mr. Shipman. [35]

* * *

Mr. Mahl: Your Honor please, I have the correspondence [36] with the Southern Pacific, if your Honor is interested in that point. I can put them in evidence as to exactly the nature of the claim.

The Court: It is a defensive matter. We will see what Mr. Shipman wants to do about it. [37]

* * *

(Testimony of John L. Wade.)

Q. Was the term "offal" used between you and Mr. Miller during that conversation of September 8th? A. It was.

Q. What was said in that regard?

A. That he would pay 2 cents per pound for the offal.

* * *

Q. Would you tell me what that term means?

A. Well, my interpretation of the term is that it means you have the liver, you have the heart, the brains, the sweetbreads, the hide, you have the fertilizer in the cow, you have the intestines. It is those parts. You get your dressed meat and then it is the balance of the critter.

In other words, if an animal weighs 1000 pounds and you have 500 pounds of dressed meat, you would have 500 pounds of offal.

Q. In other words, the difference between the dressed weight and the gross weight you consider to mean offal? A. That is correct.

Q. Now, then, directing your attention to the conversation [38] of September 10th, you again called Mr. Miller?

A. I don't follow you, Mr. Shipman.

* * *

The Court: You called him again on the 10th?
The Witness: Yes, sir.

Q. (By Mr. Shipman): What was that conversation?

A. Why, I told Mr. Miller that I would be in

(Testimony of John L. Wade.)

touch with Mr. Swanson at the ranch, etc., and that Mr. Jaffe was in Los Angeles and was going up to the ranch, and I said, "Now, I want to confirm this arrangement regarding these 10 cars of cattle, the 250 head of cattle." I said, "This is a firm commitment, is it not, Adolph?"

He said, "That is right, son. You tell Swanson to send me those cattle and I will pay 46 cents and 2 cents."

I said, "Well, I just wanted to reiterate our position, Adolph, in this matter and," I said, "if that is a firm commitment I am telling Mr. Jaffe to deliver that message to Mr. Swanson to ship the cattle down."

That is what I did. [39]

Q. And that was all of the conversation?

A. Well, I just don't recall. We may have talked about other things. I just don't recall at the time.

Q. And at that time there was no mention made again as to when the cattle would be shipped?

A. The only mention was he wanted to know approximately when, and I said, "We will ship before October 1st."

Q. And no time discussed as to how long it would take to send the cattle, to actually bring the cattle from the ranch to Los Angeles?

A. I believe we discussed the matter of eight or ten days to bring them down. Whether he volunteered to that or whether I asked him, I don't recall.

(Testimony of John L. Wade.)

Q. Was there anything said at that time between you and Mr. Miller as to any letter or contract for the purchase of the cattle? [40]

* * *

The Court: The answer will go out. The question was, was there anything said about a contract.

The Witness: No. A written contract you mean?

The Court: Yes.

The Witness: No, there wasn't.

Q. Now, as I understand it, Mr. Swanson was the treasurer or secretary of the company?

A. I believe he was the treasurer and general manager.

* * *

Q. Did you know that Mr. Swanson was in the livestock business at one time?

A. Yes, I was acquainted with that.

Q. Did you know that he was a commission merchant at the Union Stock Yards here in Los Angeles?

A. I believe that is correct. [41]

* * *

Q. Now when you were in Vancouver on the 27th of September, had the cattle arrived at Vancouver?

A. Yes, they were there when I arrived.

* * *

Redirect Examination

By Mr. Mahl:

Q. Mr. Wade, was there any faster or better way to send the cattle from Vancouver to Los Angeles than you sent them?

(Testimony of John L. Wade.)

A. Not to my knowledge. [43]

* * *

Q. What was the size of your herd the first part of September of 1948?

A. I would say about 4500 head of cattle.

Q. About how many of those were ready for market in the month of September 1948?

A. I would say 500 or 600 head in that particular bunch. [44]

* * *

Recross-Examination

By Mr. Shipman:

Q. This conversation that you had on September 10, 1948, you communicated the conversation that you had with Mr. Miller to Mr. Jaffe?

A. I did.

Q. As to the arrangement of 46 cents minimum?

A. I did, yes.

Q. Plus the 2 cents for offal? A. I did.

* * *

BEN JAFFE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [45]

* * *

Direct Examination

By Mr. Mahl:

Q. Mr. Jaffe, you are now and throughout the year 1948 was the vice president of the plaintiff corporation, is that correct? A. Yes.

(Testimony of Ben Jaffe.)

Q. About when was it that you went to the ranch in the month of September 1948? [46]

* * *

Q. Now was there a conversation between Mr. Swanson and Mr. Miller at this time when the cattle got to Williams Lake?

A. Yes, there was.

* * *

Q. The date, approximately.

A. I am not very good at remembering dates, but it was somewhere around the latter part of September.

Q. It was prior to the cattle going into Vancouver, is that right? A. Oh, yes.

* * *

Q. And you were present during the conversation?

A. Yes, I was in the phone booth with Mr. Swanson. We were squeezed in.

Q. Did you overhear the entire conversation?

A. Yes. Mr. Swanson asked me to get in the booth with him because he is a little hard of hearing, and on long distance conversations, and at various times he held the phone so we could both listen in.

Q. As a result of that were you able to hear both ends of the conversation?

A. Yes, I heard it.

Q. Will you tell us what the conversation was between Mr. Swanson and Mr. Miller?

(Testimony of Ben Jaffe.)

A. Mr. Swanson was advising Mr. Miller that he was shipping his cattle to him and Mr. Miller replied, saying that the market was a little weak in Los Angeles but nevertheless to send them on, he had a deal. And I think Mr. Swanson asked him how he wanted it consigned, and he said to send it right to the Union Packing Company. And Mr. Swanson made the notes on the way to ship it, and that was the substance of the conversation.

Q. You speak of Mr. Miller saying that he had a deal. Was anything else said in connection with that?

A. Well, no, not that I recall. There was conversation back and forth about the weather and other things. [48]

* * *

Q. (By Mr. Mahl): You state, Mr. Jaffe, that Mr. Miller said he had a deal. Are you able to give us any more of the substance of that or the words of Mr. Miller's conversation? [49]

* * *

The Witness: I don't recall any of the details of the conversation. During the conversation I knew that there was an arrangement made between Mr. Wade and Mr. Miller because I had notes of it that I took to Canada with me. I had the notes which I showed to Mr. Swanson, showing 46 cents and 2 cents. And to me there was nothing particularly significant about it. We were advising him the cattle were on their way, and that was it.

(Testimony of Ben Jaffe.)

The Court: The answer to the question was "No." We will strike out the rest of it. [50]

* * *

Q. Thereafter the cattle were shipped from Williams Lake to Vancouver, were they not?

A. Yes, they were.

* * *

Q. Now after the cattle had arrived and, as a matter of fact, after they had been slaughtered by the defendant corporation, you made a claim against the Southern Pacific Company, did you not?

A. Yes, I did.

Mr. Mahl: May this be marked for identification.

The Clerk: Plaintiff's Exhibit 10 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 10 for identification.)

Q. (By Mr. Mahl): Mr. Jaffe, I show you Plaintiff's Exhibit 10 for [51] identification, and will ask you if that is a copy of a letter that you wrote to the Southern Pacific Company. A. Yes, it is.

Q. And in what connection was that letter written?

A. In connection with freight rates. They seemingly quoted a freight rate at Williams Lake for shipment of the cattle here and that freight rate was communicated to me and when the cattle arrived and I saw the bills, why it was a different freight rate. So I wrote this letter asking for a re-

(Testimony of Ben Jaffe.)

fund. And they had one or two other charges for feeding cattle at some of the stopping points en route, and I challenged some of the costs of that particular feed, and it is all embodied in this particular letter.

The Court: Is that the only claim your company made?

The Witness: That is the only claim that our company made.

Q. (By Mr. Mahl): Did you at any time ever make any claim against the Southern Pacific or any other carrier for any loss of weight of these cattle?

A. Never.

Mr. Mahl: I will ask that this be marked plaintiff's exhibit next in order.

The Court: You mean you offer it in evidence?

Mr. Mahl: Yes. [52]

The Court: It will be received in evidence.

The Clerk: Plaintiff's Exhibit 10 in evidence.

* * *

Mr. Mahl: I believe Mr. Shipman will stipulate with me, if your Honor please, that the live weight of these cattle when delivered to the Union Packing Company was 269,620 pounds.

Mr. Shipman: When delivered to them by the Southwest Commission Company.

Mr. Mahl: When they received the cattle, that was the weight.

The Court: It is a fact that they came to the Union yards from the Southwest yards, did they not?

Mr. Mahl: That is correct, your Honor.

(Testimony of Ben Jaffe.)

The Court: That will be part of the stipulation then? Mr. Shipman: That is correct.

Mr. Mahl: And also that the number of pounds of dressed beef from these cattle is 148,015 pounds.

Mr. Shipman: That is correct.

* * *

Mr. Shipman: Pardon me. I didn't add these slips, but that figure of 148,000, is that the net after deducting the 3 per cent?

Mr. Mahl: Yes. That is from the records of Mr. Shipman's [54] client.

Mr. Shipman: Yes, we furnished them.

* * *

The Court: How long have you been in the cattle business, Mr. Jaffe

The Witness: Not very long.

* * *

Cross-Examination

By Mr. Shipman:

Q. The clerk handed you Exhibits 5-A, 5-B and 6. You have examined Exhibits 5-A, 5-B and 6 introduced by the plaintiff for identification, have you? A. Yes.

Q. And 5-A is a copy of a letter that you wrote to Mr. Miller on November 15, 1948? A. Yes.

Q. Would you like to see this again?

A. I already looked at them.

Q. And 5-B is a statement to the Union Packing Company. Both 5-A and 5-B were prepared by you?

(Testimony of Ben Jaffe.)

A. Yes.

Q. And sent to the Union Packing Company?

A. That is correct. [55]

Q. And also Exhibit 6, a letter of November 24, 1948, was also written by you to Mr. Miller and mailed to him? A. Yes.

Q. And also the preceding two exhibits were mailed to Mr. Miller?

A. You refer to all those papers?

Q. Yes. A. I say yes to all of them.

Q. They were all mailed to Mr. Miller?

A. Yes, that is right.

Mr. Shipman: May I be permitted to introduce these as defendant's exhibits?

Mr. Mahl: No objection.

The Court: They will be received in evidence.

* * *

Q. You were here when Mr. Wade gave his testimony that you filed a claim for shrinkage?

* * *

A. Yes, I was here.

* * *

Q. Would you say that it was done or was not done?

A. I would say it was not done because Mr. Wade was not here. I was here. He was up at the ranch. We were working quite a long distance apart and we had a claim and he had a lot of other matters to attend to, I presume, and the only claim we made was for freight. [57]

(Testimony of Ben Jaffe.)

* * *

Q. You don't know of any other claim?

A. Not that I know of.

* * *

Redirect Examination

By Mr. Mahl:

Q. Mr. Jaffe, Plaintiff's Exhibit 5-B, being the statement attached to your letter of November 15, 1948, which is 5-A, gives the gross weight of the cattle, live weight, at 269,420 pounds, and then it states, "Dressed at 53½ per cent." Where did you get that figure of 53½ per cent as the dressed percentage of the beef?

A. Mr. Swanson was in touch with Mr. Miller, with the Union Packing Company, I wasn't in direct touch, and I had asked him on several occasions to have these people pay the money they owed us, and he said that he would see Mr. Miller and Mr. Miller would give him the dressed weights. And on several occasions I asked him, "How about it, Ray, where are the figures?"

"Well," he said, "here is the best I can calculate. He has them in his own records and if you are going to make out a bill we better estimate the average kill for the dressed [58] weight."

So I made the bill on that basis and felt that if there was anything wrong with it the Union Packing Company would notify me and we can make any adjustment that was necessary.

* * *

(Testimony of Ben Jaffe.)

Q. Did you have any knowledge of the actual records of the Union Packing Company at the time you made this statement and put in 53½ per cent?

A. No, I had no records whatever.

* * *

Q. And this was prepared upon information that Mr. Swanson had given you, is that correct?

A. That is correct.

Q. And Mr. Swanson advised you that he had talked with Mr. Miller and that was the information he had gotten from Mr. Miller, is that correct?

A. That is correct.

Q. Did you ever receive any answer to your letter to [59] Mr. Miller of November 15th, asking for payment? A. I never heard from him.

Q. Was any answer received by the company to your letter of November 24, 1948, again asking for payment?

A. I had no replies whatsoever.

The Court: Referring to Exhibit 5-B, which I believe is the statement, you show a certain number of pounds which is termed "utility," and you say "at agreed price of 42 cents per pound." I am quoting from memory.

(The document referred to was passed to the court.)

The Court: It reads as follows: "One-third dressed 'utility,' or 48,046 pounds at agreed price of 42 cents a pound, \$20,179.32." Where did you get this information, that the agreed price was 42

(Testimony of Ben Jaffe.)

cents?

The Court: Where did you get that information? The Witness: The agreed price?

The Court: Yes.

The Witness: I took the commercial price which was agreed upon and then took the utility market price, which is usually so much lower, and put that figure down figuring that if we were wrong he would get in touch with me, which he didn't.

The Court: Does "utility" generally sell for 4 cents lower than commercial? [60]

The Witness: To my knowledge, that is usually the spread.

The Court: That is how you arrived at 42 cents?

The Witness: That is right.

Recross-Examination

* * *

By Mr. Shipman:

Q. Mr. Jaffe, you read this complaint before you signed it, and that is your signature?

A. Yes, that is my signature.

Q. And you had read the complaint before you signed it? [61] A. Yes.

Q. Now how did you arrive at the sum of \$51,300.70 and no more as having been paid? Was it the Union Packing Company that paid you?

A. They didn't pay me that, no, me personally.

Q. I mean the company.

(Testimony of Ben Jaffe.)

A. I don't understand your question, Mr. Shipman.

Q. You say that you have received on account the sum of \$51,300.70.

A. What is it that you want to know?

Q. Doesn't your statement, 5-B, show a sum of money far in excess of that?

A. May I see the statement?

(The document referred to was passed to the witness.)

The Witness: I want you to know that there is a lapse of about two years from the time I sent the statement out to the time I signed the complaint. I took it for granted that the statement in the complaint is correct.

Q. (By Mr. Shipman): It was just a few days more than a year, was it not?

A. Well, a year is quite a long time.

Q. Where did you get that information?

A. Which information?

Q. The information that you state in your complaint, \$51,300.70.

A. That was prepared by the attorney. [62]

Q. You read it?

A. Yes, I read it, but I didn't have the statement in front of me to compare it with.

Q. And if you had had the statement before you, would you have said that you did not know "and has no means of ascertaining when defendant slaughtered said cattle, the aggregate number of

(Testimony of Ben Jaffe.)

pounds of dressed beef defendant processed therefrom''?

A. I wouldn't know what I would have said, Mr. Shipman.

The Court: Everybody knows that usually the lawyer draws the complaint and then gives it to his client to sign.

Mr. Shipman: We are conceding over \$6000 more than the complaint states.

The Court: That does not have much weight with me as a court. If this was a jury trial and you wanted to spend some time on that, you might get somewhere, but we will find out eventually what the claim was. You may inquire as to that.

Proceed.

Mr. Shipman: That is all.

Redirect Examination

By Mr. Mahl:

Q. At the time this complaint was signed by you you had never seen and had no access to any of the records of the [63] Union Packing Company, did you? A. I had not seen them, no.

* * *

Mr. Mahl: I don't think there is any issue on that, and I believe the figures, Mr. Shipman—we might stipulate right now—show that there was paid on account of this shipment the sum of \$57,850.17.

Mr. Shipman: Not on account of this ship-

(Testimony of Ben Jaffe.)

ment. It was paid to the Southwest Commission Company.

Mr. Mahl: Let us put it this way: We received on account of this shipment the sum of \$57,850.17.

The Court: Let us limit the stipulation. I know what [64] Mr. Shipman's point is. Limit the stipulation to the fact that the plaintiff received, without stating from where, for these cattle \$57,850.17. Is that satisfactory?

Mr. Mahl: And no more.

* * *

Mr. Mahl: I am taking that from your own records. Mr. Shipman: That is all right.

Mr. Shipman: That is all right then, those two tags.

Mr. Mahl: These two tags total \$57,850.17.

* * *

The Court: As I understand the facts, and the court will draw his own conclusions from the facts, it is that the Union Packing Company paid \$57,850.17. Mr. Shipman: That is right.

The Court: That amount of money apparently went to the Southwest Commission Company.

That the plaintiff received from the Southwest Commission Company or elsewhere the same amount of money. [65] That the plaintiff got for the cattle \$57,850.17. Mr. Mahl: That is correct.

The Court: Is that right?

Mr. Shipman: Yes.

Mr. Mahl: We so stipulate, if your Honor please.

The Court: Do you so stipulate, Mr. Shipman?

Mr. Shipman: Yes, your Honor.

Mr. Mahl: Mr. Swanson, please.

RAY SWANSON

called as a witness by and on behalf of the plaintiff,
having been first duly sworn, was examined and
testified as follows:

* * *

Direct Examination

By Mr. Mahl:

* * *

Q. In the year 1948 you were connected with
the plaintiff company, were you not?

A. I was. [66]

Q. You are not now connected with the plaintiff?

A. I am not.

* * *

Q. I am not asking you for the conversation, but
you did have a conversation with Mr. Wade rela-
tive to a conversation Mr. Wade had had with Mr.
Miller, is that correct?

A. That is correct. He called me on the phone.

* * *

Q. After that conversation, Mr. Swanson, ap-
proximately 250 head of cattle were brought from
the ranch into Williams Lake, were they not?

A. That is right.

Q. And at Williams Lake you had a telephone
conversation with Mr. Miller in Los Angeles, is
that not correct? A. That is right.

(Testimony of Ray Swanson.)

Q. And Mr. Jaffe was present with you when you had [67] that conversation?

A. He was with me.

Q. Now will you tell us what the conversation was between you and Mr. Miller, as nearly as you can recall, Mr. Swanson?

A. It is rather hard to recall the entire conversation, but I called Adolph and, if I recall the conversation, I tried to sell the cattle there in Williams Lake——

Q. We will get to that in a moment.

The Court: What did you say over the telephone?

Q. (By Mr. Mahl): We are confining ourselves to this conversation on the phone.

A. Well, as I recall it, I asked about the market in Los Angeles and, if I recall my statement, I said to Adolph, "Well, is it all right to ship the cattle to the Union Packing Company?"

He said, "Well, the market is awfully weak down here, but try to sell them there if you can. If not, ship them." Or words to that effect. I don't recall.

* * *

Q. The cattle were then shipped from Williams Lake to Vancouver, is that correct?

A. I billed them out that night to Vancouver.

Q. And you went from Williams Lake to Vancouver? A. Right.

Q. The cattle were unloaded at Vancouver for water and feeding, is that right?

A. Yes, that is correct.

(Testimony of Ray Swanson.)

Q. Now did you meet Mr. Wade in Vancouver?

A. Yes.

Q. And this was about September 27th, was it not?

A. I wouldn't know the date. He came in there one morning about 4:00 o'clock and met me.

Mr. Mahl: May I have Plaintiff's Exhibit 1?

(The document referred to was passed to counsel.)

Q. (By Mr. Mahl): I show you, Mr. Swanson, Plaintiff's Exhibit No. 1, being a telegram bearing date of September 28th. Does that telegram or the date on that telegram refresh your recollection as to when you met him?

A. That was perhaps the date.

Q. You sent that telegram, Plaintiff's Exhibit No. 1?

A. I sent that from Vancouver.

Q. At Vancouver?

A. Yes. [69]

Q. To Mr. Miller?

A. That is right.

Q. Now you also arranged for the cattle to be shipped down to the defendant, did you not?

A. That is right.

Q. And they were consigned to the Union Packing Company by you?

A. Union Packing Company by me.

Q. You consigned them to the Union Packing Company?

A. That is right.

The Court: Did you send the wire before or after the cattle were shipped?

The Witness: Before.

(Testimony of Ray Swanson.)

The Court: How long before?

The Witness: If I recall correctly, I sent that wire along in the afternoon, and I left Vancouver, I believe, that night or the next day and flew down here, and the cattle went out I think one day after I left Vancouver, as I recall.

Q. (By Mr. Mahl): That is, you left the day after that telegram was sent, the 29th, or was it the 30th?

A. I am not sure whether I left that night or the following day. I am not certain about that.

Q. But you had made full arrangements for the cattle to be shipped down to the Union Packing Company before you [70] left Vancouver, had you not? A. Right.

* * *

Q. Did you have any further communication with Mr. Miller or anyone at the Union Packing Company from the time of your conversation in Williams Lake until you saw Mr. Miller in Los Angeles, did you hear from anyone connected with the Union Packing Company? A. No.

Q. How many places are there in Vancouver where cattle can be unloaded for feed and water?

* * *

Q. Let me amend that and make it where they are unloaded for feed.

A. At the stockyards in Vancouver.

Q. Is that the only place you know of? [71]

A. The only one to my knowledge.

(Testimony of Ray Swanson.)

Q. What date did you arrive in Los Angeles?

A. It was either the night that this telegram was sent or the following night. That I can't recall.

* * *

Q. How long was it after you arrived in Los Angeles that you saw Mr. Miller or talked with Mr. Miller for the first time?

A. Well, the next day or two after I arrived.

* * *

Q. Had the cattle as yet arrived when you first talked with Mr. Miller? A. No.

Q. And where did the first conversation you had with Mr. Miller take place?

A. Down at his office at the Union Packing Company.

Q. Why did you go to his office?

A. Because I billed the cattle down here. [72]

* * *

Q. Will you tell us what the conversation was?

A. Well, I told Adolph that the cattle were on their way down, and had a general conversation. And Adolph said to me that he would have to see what he could do with the cattle when they got down and suggested that we go over and talk to Paul Hill.

Q. Did Mr. Miller say that he would or would not accept the cattle?

A. He said that he hadn't made a deal.

* * *

(Testimony of Ray Swanson.)

Q. Did you, without giving the substance of it, did you telephone to Mr. Wade after that conversation?

A. Yes, I called Mr. Wade after I talked with Adolph and I told him that Adolph said that he hadn't made any definite deal.

* * *

Q. You later saw Mr. Miller, did you not, at a subsequent meeting?

A. Yes, I saw him several times after that. [73]

Q. What was done in connection with these cattle? What did Mr. Miller do in connection with these cattle?

* * *

A. The cattle were diverted. They were billed to the Union Packing Company, S. P. stockyards, Los Angeles, and they were diverted over to the Union Stockyards, to the Southwest Commission Company.

* * *

Q. Now, as I understand it, the cattle were diverted. By whom were they diverted? They were consigned to the Union Packing Company. Now who diverted the cattle?

A. Union Packing Company. [74]

Q. And to where did they divert them?

A. Union Stock Yards, Southwest Commission Company.

* * *

Q. And were you present when Mr. Miller had

(Testimony of Ray Swanson.)

any conversation with any of the officials of the Southwest Commission Company?

A. Yes, I was.

Q. The Southwest Commission Company operates out of the Union Stock Yards, do they not?

A. That is right.

Q. And their business is the purchase and sale of cattle, is it not? A. The sale of cattle.

Q. Were you present when Mr. Miller had a conversation with Mr. Hill of the Southwest Commission Company? [75] A. Yes, I was.

Q. What was said at that conversation?

A. Well, it is pretty hard for me to recall that conversation. It was general talk.

Q. Let me ask you this: Did or did not Mr. Miller suggest to Mr. Hill of the Southwest Commission Company that he, Mr. Hill, endeavor to get bids for these cattle, prices for them?

A. Well, they were billed to him and naturally that is what the purpose of the commission company is.

Q. Exactly. A. To sell cattle.

Q. Did Mr. Miller ask the Southwest Commission Company to see what prices they could get for these cattle?

A. I don't recall that he did. It was natural for the commission company, that a commission company try to sell them at the best prices. That is their general business.

Q. What was the best price that the Southwest

(Testimony of Ray Swanson.)

Commission Company got for the cattle, the best bid?

A. The best bid?

Q. Yes. A. Until the sale time?

Q. Yes.

A. Well, if I recall correctly it was 21 cents. They sold for 21½ cents, didn't they? [76]

Q. I am not permitted to state to you. I am asking for your best recollection.

A. As I recall it, 21 cents.

Q. Twenty-one cents per pound?

A. From the Cudahy Packing Company.

The Court: That is live weight?

The Witness: Live weight.

Q. (By Mr. Mahl): Now what did Mr. Miller buy the cattle for?

A. Fifty cents a hundred more.

Q. Or 21½ cents? A. Right.

Q. Did you ask anyone at the Southwest Commission Company to get prices of these cattle?

Mr. Shipman: That has been asked and answered, your Honor.

The Court: Overruled.

Mr. Swanson, when did you first find out the cattle were going to be diverted from the Union Packing Company to the Southwest Commission Company?

The Witness: They were being diverted the day I arrived, if I remember correctly.

The Court: You knew at that time?

The Witness: The day I talked with Mr. Miller, the first time. I think that is the time that they

(Testimony of Ray Swanson.)

were being [77] diverted.

The Court: Did you contact the Southwest Commission Company or did somebody at Union Packing Company contact them?

The Witness: I went over with Mr. Miller to the Southwest Commission Company.

The Court: That is where you saw Mr. Hill?

The Witness: That is where I met Mr. Hill over there.

The Court: Did you know Mr. Hill before?

The Witness: Yes, I have known him for many years.

The Court: Had you known Mr. Miller before?

The Witness: Yes, for years.

The Court: You have been an old hand at this game, have you not?

The Witness: I was in the commission business down at the yards.

The Court: What happened when you got to Mr. Hill's office?

The Witness: Well, we talked about the prices of cattle and what they would do, and I was in a spot. They were coming over there on the yards to be sold and I didn't know whether—Adolph said he hadn't bought them and I had the cattle coming and I had to get rid of them.

The Court: What was said between Mr. Hill, you and Mr. Miller? Do you remember something about that conversation?

The Witness: Well, if I recall correctly, Adolph said, [78] "Well, now, as you know, Paul is one of

(Testimony of Ray Swanson.)

the best commission men in the yards, and we can see how they go in the yards here, see what they do," or words to that effect. "Paul will try to sell them in the yards." That is when I called Mr. Wade after that conversation.

The Court: Did Mr. Miller at that time say that he would better the price that Hill would get?

The Witness: No.

The Court: Did that come up later?

The Witness: That came up later I think that day. We had only a certain number of days before the cattle had to be slaughtered and that morning over at the yards, if I remember correctly it was on a Thursday morning, and I knew a lot of the buyers, I had a lot of my friends there, old friends, buyers, I had them all over there trying to get bids on the cattle, fellows like Luer Packing Company and Great Western. Fellows that I knew very well, and we weren't able—the best bid we got—and Adolph said to me, well, he made a remark, "I will pay 50 cents more than anyone else will pay for them." That was made that morning, if I remember correctly. [79]

* * *

Q. (By Mr. Mahl): Mr. Swanson, if I understand you correctly, you did not see Mr. Hill until after Mr. Miller had told you he would not take the cattle, is that not correct?

A. Yes, that is when we went over to Paul Hill's office.

Q. But that was after Miller said he wouldn't

(Testimony of Ray Swanson.)

take the cattle?

A. He said that he hadn't bought them.

Q. And you made no effort in connection with these cattle until after Mr. Miller told you he hadn't bought them, is that correct?

A. That is right.

Q. Did the regulations of the Department of Agriculture requiring cattle to be slaughtered within 12 days after entry into this country play any part in your activities here in Los Angeles after the cattle arrived?

A. Certainly. The cattle didn't arrive for, I guess, 10 days after they entered the States and I only had a certain length of time before they had to be slaughtered. However, we got an extension of some time. Paul Hill got an extension out of Washington for a few days. I am not sure how many days.

Q. This was over a weekend that these discussions were being had, wasn't it? [80]

A. (Pause.)

Q. In order to assist you, Mr. Swanson, the cattle arrived on October 6th, which was a Wednesday.

A. I presume it was over the weekend then.

Q. And the following Tuesday, being October 12th, was a holiday, was it not?

A. Yes, the 12th would be a holiday. [81]

* * *

Q. Mr. Swanson, after the slaughter of the cattle did you take a trip with Mr. Miller to Blythe after the time the cattle were all slaughtered?

(Testimony of Ray Swanson.)

A. That is right.

Q. Did you make any inquiry of him at that time what percentage of dressed beef came from those cattle?

A. I think I mentioned it to him. I asked him how [83] those cattle dressed out, and if I recall correctly he said around 53½ per cent.

Q. You are familiar with the statement that was sent by the plaintiff company to Mr. Miller for the balance due on these cattle, are you not?

A. The statement that was sent to him?

Q. Yes. A. Yes.

Q. Did you assist in the preparation of that statement? A. Yes, with Mr. Jaffe.

Q. Where did the figure of 53 per cent used in that computation on that statement come from?

A. Where did I get that figure?

Q. Yes.

A. I just said—I was talking with Adolph on that trip and I asked him about what those cattle dressed out, and he said, “Oh, I think around 53½,” if I remember correctly.

Q. And you and Mr. Jaffe used that figure in preparing that statement of November 14th, did you not? A. That is right. [84]

* * *

Cross-Examination

By Mr. Shipman:

Q. Mr. Swanson, before you talked with Mr. Miller from Vancouver—was that talk with Mr. Miller from Vancouver or Williams Lake?

(Testimony of Ray Swanson.)

A. Williams Lake. [85]

Q. Was there more than one conversation?

A. Just one.

Q. You didn't talk about the matter to Mr. Miller at all before that? A. No, I never did.

Q. Before the shipment of the cattle to Los Angeles, did you make any efforts to sell the cattle to others around Williams Lake or Vancouver or anywhere other than Mr. Miller? A. Yes, I did.

Q. And was that after Mr. Wade had told you—that was after Mr. Jaffe came up?

A. Yes.

Q. With the message from Mr. Wade?

A. Yes.

Q. Were you able to make a sale?

A. Yes, I had them sold when I got to Williams Lake, supposed to have them sold, and when I got in there the Canadian packers backed out on the deal. I had made the deal over the telephone with them, and he bid me, if I recall correctly, he bid me 21 cents at Williams Lake, and when I got in there he wanted to cut the cattle the morning we were to weigh them up.

Q. Would you tell us what it means to cut the cattle? A. How is that?

Q. Would you explain what you mean by the term "cut the [86] cattle"?

A. He wanted to take, say, 200 of them at the 21 cents and cut 50 back at a lesser price. That is a cut-back.

Q. Did you try to sell them to anyone else?

(Testimony of Ray Swanson.)

A. Yes, I tried to sell them in Vancouver.

Q. What happened to your efforts?

A. Well, I was bid $22\frac{1}{2}$ cents, I believe, in Vancouver for them from a Seattle buyer.

Q. Did Mr. Jaffe know that you were trying to make the sale in Canada? A. In Canada?

Q. Yes.

A. Yes, he was with me at Williams Lake.

Q. When you were trying to make the sale to people other than Mr. Miller? A. Yes.

Q. And that was at a time when Mr. Jaffe came to Williams Lake from Los Angeles with a message to you from Mr. Wade? A. Right. [87]

* * *

Q. When you came to Los Angeles had the cattle arrived yet? A. No, they had not.

Q. You had a conversation with Mr. Miller the first or second day after your arrival?

A. Yes, I did.

Q. And at the time that you had the conversation with Mr. Miller had the cattle come into Los Angeles as yet? A. They had not come.

Q. And what did Mr. Miller tell you in the first conversation you had with him, or at any time before the cattle came to Los Angeles, as to whether or not he would take them?

A. Well, he told me that he hadn't made a deal for the cattle, hadn't made any firm deal.

Q. In the conversation that you had with him on the telephone from Williams Lake, at which Mr.

(Testimony of Ray Swanson.)

Jaffe participated—now Mr. Jaffe was just standing there, wasn't he? A. That is right.

Q. Or was he listening in?

A. He was standing there. [88]

Q. Was he able to hear?

Mr. Mahl: Just a moment, if the court please. That calls for a conclusion of this witness.

The Court: Not in view of the testimony that was heretofore given. Objection overruled.

You may answer, was Jaffe listening in? Did he hear part of the conversation?

The Witness: Yes, I think he could perhaps hear part of it.

The Court: Were you holding the receiver so both of you could hear?

The Witness: I had the receiver like this (indicating).

The Court: Flat against your ear or away from your ear?

The Witness: I think it was away from my ear.

Q. (By Mr. Shipman): Did Mr. Miller say anything to you that if you wanted to ship the cattle to Los Angeles it should be shipped to the Union Stock Yards?

A. I am not certain where I got the instructions to ship to the Union Packing Company at the S. P. yards, whether Mr. Jaffe brought that to me or what. I am not certain about that.

Q. Do you remember anything in that conversation with Mr. Miller as to whether or not Mr. Miller told you if you were going to ship the cattle

(Testimony of Ray Swanson.)

to ship them to the Union Stock [89] Yards and not the Union Packing Company?

The Court: Are you talking about the phone conversation now?

The Witness: As I recall that conversation—this is my recollection—I asked him about the market and then I naturally supposed that this is a deal which Wade and he had made, and I asked him, “Well,” I said, “is it all right to ship the cattle down to you?” I believe that is the way I put it. I am not certain about just what the wording was.

The Court: What else did he say?

The Witness: And he said to me, “He said the market is bad down here, try to sell them up there if you can.”

The Court: Do you remember him saying anything about he had a deal?

The Witness: No, we didn't discuss that on the telephone.

The Court: Did he say, “Send them on”?

The Witness: As I recall, he said, “If you can't sell them why send them on.”

Q. (By Mr. Shipman): Did he say that he would use them? A. Well, I just——

Q. Did he say that to you?

A. No, I don't think so.

Q. You had no other discussion as to the price? [90]

A. No.

Q. Now you had this conversation with Mr. Mil-

(Testimony of Ray Swanson.)

ler from Williams Lake after you made the attempts to sell the cattle in Canada?

A. After I tried to sell them at Williams Lake.

Q. At Williams Lake? A. Yes.

Q. Now will you tell us what happened when you came to Los Angeles?

A. I went down to Mr. Miller's office, told him that the cattle were on their way down here, and they should arrive in about a week or 10 days, a week or seven or eight days, that is the time when Adolph told me, and at the time I mentioned about slaughtering the cattle they had to be slaughtered in a certain length of time, all of which he knew, of course. And he said—well, I told him what Mr. Wade and Mr. Jaffe had told me the deal was for the cattle and he told me he hadn't made that kind of a deal.

Q. Did you ask him to divert the cattle to the Union Stock Yards?

A. No, I don't think I did.

Q. How was it that the cattle were diverted to Mr. Hill or to the Union Stock Yards?

A. That is when Mr. Miller asked me, he said he will go over and talk to Paul Hill, Southwest Commission Company. [91] We went and talked with Paul about the market conditions and Paul seemed to think that that was—he had a lot of bidders and the market was weak, that that might be the best place to sell them. Well, I didn't dispute it.

(Testimony of Ray Swanson.)

Q. And you were in the commission business at one time? A. Yes, sir.

Q. At the Union Stock Yards?

A. Yes, sir.

Q. For what period of time?

A. A little over a year.

Q. During what period of time?

A. What years? [92]

Q. Yes.

A. I believe that was in '38 and '39.

Q. Do you know whether the signature of the person to whom merchandise is shipped is necessary to make a diversion?

A. I thought it would be.

Q. You knew that the cattle were being diverted to the Union Stock Yards? A. Yes.

Q. So that Mr. Hill could sell them?

A. Yes.

Q. Did you discuss the terms of handling by the Southwest Commission Company of the deal for you? A. No, I didn't. [93]

* * *

Q. You knew then that he was going to sell the merchandise, the cattle? A. Yes.

Q. Did you keep in touch with Mr. Hill after the arrival of the cattle in Los Angeles and until they were sold? A. Yes.

Q. When Mr. Hill told you from time to time what offers he received for them——

A. Yes.

(Testimony of Ray Swanson.)

Q. ———did he say to you whether it was wise or unwise to sell at those offers? A. Yes.

Q. Did he by himself or upon your instructions obtain an extension of time for the sale and slaughter of the cattle?

A. I believe we talked about it and he proceeded to get the extension out of Washington.

Q. And when you say that we talked about it, whom do you mean? A. Mr. Hill and myself.

Q. After Mr. Miller refused to take the cattle from you, did you have any other plans to dispose of the cattle except through the stockyards? [94]

A. That is the only outlet.

Mr. Shipman: That is all.

Redirect Examination

By Mr. Mahl:

Q. Mr. Swanson, did you ever talk with Mr. Hill about these cattle except when you went to the Union Stock Yards with Mr. Miller?

A. The first time I talked to him I went with Mr. Miller.

Q. Was Mr. Miller with you on the other occasions that you talked with Mr. Hill?

A. Well, not always. I was in the yards every day while those cattle were here.

* * *

Q. How long have you known Mr. Miller?

A. I don't believe I said 20 years.

Q. How long?

(Testimony of Ray Swanson.)

A. I have known Mr. Miller since—well, I guess that is right, in the early 30s.

Q. Now the Union Packing Company is not a commission [95] house, is it? A. No.

Q. In other words, they are not in the commission business? A. No.

Q. They don't buy and sell cattle, they buy cattle and slaughter it, isn't that correct?

A. The Union Packing Company buys and slaughters.

* * *

Q. Mr. Swanson, did you know when you attempted to sell cattle in Williams Lake that there were other cattle available on the ranch ready for sale?

A. You mean ready for sale at that time?

Q. Or very shortly thereafter.

A. Within another 30 days.

Q. Were there as many as 250 head within another 30 days? A. I think so. [96]

Recross-Examination

By Mr. Shipman:

Q. Mr. Swanson, when you were attempting to sell the cattle in Canada did you show any of the cattle to buyers? A. Oh, yes.

Q. And you didn't show them the cattle that were going to be ready in 30 days, did you?

A. I showed the cattle I had there.

(Testimony of Ray Swanson.)

Q. And that was the same cattle you shipped to Los Angeles? A. That is right.

* * *

ADOLPH MILLER

called as a witness by and on behalf of the plaintiff under Rule 43(b), having been first duly sworn, was examined and testified as follows: [97]

* * *

Cross-Examination

By Mr. Mahl:

Q. Mr. Miller, you are and were throughout the year 1948 the president and general manager of the Union Packing Company?

A. That is right.

Q. Do you recall a conversation that you had with Mr. Wade, a telephone conversation in the month of September, 1948? A. Yes.

Q. Are you able to place that date with any degree of certainty? A. No, I am not.

Q. During that conversation the purchase of cattle by you from the plaintiff was discussed, was it not?

A. Not the purchase, the handling of cattle.

Q. The what? A. The handling.

Q. Not the purchase of cattle? A. No.

Q. Mr. Miller, your deposition was taken in this case, was it not? A. That is right.

Q. I hand you a copy of it. Will you look on page 7, line 3, of your deposition? [98]

A. (Examining deposition.)

(Testimony of Adolph Miller.)

Q. I will ask you if this question was asked and if your answer was not as I give it—I am reading from the top of page 7:

“Q. You were here in Los Angeles at the time, were you not?

“A. Yes—what our market conditions were, and he described somewhat the cattle that they expect to have out of their ranch, and wanted to know whether we could handle it. We handle all grades of cattle. So I told him we possibly could.”

That is your testimony?

A. That is correct.

Q. Was there any other conversation at that time, that you recall?

A. The only thing that I can recall is as to market conditions.

Q. I am speaking now of what you and Mr. Wade said on the telephone at that telephone conversation. What else, if anything, can you recall?

A. Mr. Wade asked me what our market conditions were, and I described them as closely as I could as to what they were on that particular day.

Q. That was all that was said? [99]

A. That is all that was said.

Q. He asked you what the market conditions were and you told him?

A. That is right.

Q. Nothing else was said?

A. Not that I can remember.

Q. Did you have any other telephone conversa-

(Testimony of Adolph Miller.)

tion with Mr. Wade prior to the time that these cattle arrived in Los Angeles?

A. I think he called me a second time.

Q. About how long after the first time?

A. I couldn't recollect for certain, but I imagine it was just a few days.

Q. And that was a telephone conversation?

A. That is right.

Q. What was said?

A. Still the same thing, and he wanted to know about how these cattle were selling, and I expressed as to what they were selling in our market here.

Q. What did you say they were selling in your market, if you remember?

A. Well, I told him what the live market was and I also told him about what we were getting for beef.

Q. Did you tell him in figures per pound?

A. I don't exactly remember, but I might have.

Q. Was there any other conversation?

A. No other conversation.

Q. Nothing else said at that conversation?

A. Not that I can remember.

Q. You have related to us fully what was said at those two conversations? A. That is right.

* * *

Q. Mr. Miller, you received the telegram sent by Mr. Swanson, which is Plaintiff's Exhibit No. 1—I show you a photostat of it—

May I have the original?

(Testimony of Adolph Miller.)

(The document referred to was passed to counsel.)

Q. (By Mr. Mahl): I show you Plaintiff's Exhibit No. 1 and ask you if you received that telegram?

A. Yes, I did.

Q. You received it shortly after the date it bears, September 28? A. I imagine so.

Q. What did you do when you received that telegram?

A. I immediately tried to locate Mr. Swanson at the place where the telegram was sent. [101]

Q. And that is Vancouver?

A. Vancouver, that is right.

Q. Where in Vancouver did you try to reach Mr. Swanson?

A. Well, I asked operator to try to get him in the stockyards there, if there is any stockyards.

Q. Did you try any of the hotels?

A. I just instructed operator to try to locate Mr. Swanson for me in British Columbia.

Q. Vancouver? A. Vancouver.

Q. And you didn't get Mr. Swanson with those instructions to the operator, did you?

A. No, I didn't.

Q. Did you make any effort to phone to the ranch? A. No, I didn't.

Q. Did you make any effort to reach Mr. Swanson at Williams Lake? A. No.

Q. So that all you did was ask the operator to

(Testimony of Adolph Miller.)

try to get Mr. Swanson at the stockyards in Vancouver? A. That is right.

Q. I misworded my question. You did not try to get either Mr. Wade or Mr. Jaffe at the ranch?

A. I didn't know those two people. [102]

Q. The question is, if you made an effort to get either of them. A. No, I didn't.

Q. Now the cattle were billed to you at the Union Packing Company, were they not?

A. Originally; yes, sir.

Q. And you diverted them, did you not?

A. They had to be diverted by——

Q. Just a moment. I am asking if you diverted them. A. I did, yes.

Q. Did you mean that you did personally or your office? A. No, I had a man divert them.

Q. Is there a Mr. Mel Hart connected with your organization? A. Yes.

Q. Are you familiar with his handwriting?

A. Yes.

Q. I will ask you if this is in his handwriting.

The Court: Have you marked that for identification?

Mr. Mahl: I was going to put it right in evidence.

The Witness (Examining document): That is right.

The Clerk: Plaintiff's Exhibit 11.

(The document referred to was marked Plaintiff's Exhibit No. 11 for identification.) [103]

(Testimony of Adolph Miller.)

Q. (By Mr. Mahl): This is his handwriting, is it not?

A. That is his handwriting.

Q. And this is the diversion order to which you referred? A. That is right.

Mr. Mahl: We offer it in evidence as the next exhibit in order, please.

The Clerk: Plaintiff's Exhibit No. 11.

(The document previously marked Plaintiff's Exhibit No. 11 for identification was received in evidence.)

Q. Now you knew at the time these cattle arrived here of the regulation that they must be slaughtered under the regulations of the Department of Agriculture within a few days, did you not?

A. Yes, sir.

* * *

Q. You had a conversation with Mr. Hill in regard to these cattle, did you not? [104]

A. In the presence of Mr. Swanson.

* * *

Q. Will you turn to page 32 of your deposition, please, Mr. Miller. I ask if this is not the testimony you gave at the time of your deposition—page 32, line 4:

“Q. You had this conversation with Mr. Hill?

“A. That's right.

“Q. Was anyone else present?

“A. No.

(Testimony of Adolph Miller.)

“Q. What was said at that conversation?

“A. He told me that he had some awful mean bids on the cattle from different people.

“Q. Bids?

“A. Yes. Offers. And wanted to know whether I can handle the cattle. I told him to try to get as much as he can out of them, and if he can't, why then I will try to buy them from him in order to help out Mr. Swanson. That is what I was mainly interested in.” [105]

* * *

Q. May I shorten it this way: Isn't it a fact that the highest bid he was able to get was \$21 a hundred from the Cudahy Packing Company?

A. That is right.

Q. And you paid \$21.50 a hundred, didn't you, for these cattle?

A. That is right.

Q. Had you ever done any business before with the Cariboo Land & Cattle Company?

A. I have not. [106]

Q. You didn't know them before this?

A. No.

The Court: How did you happen to bid 21½ cents when Cudahy bid 21?

The Witness: Well, the whole transaction with Mr. Swanson, as far as I was concerned, was merely a friendly proposition. I have done business with Mr. Swanson in the past and we have discussed about these cattle out of Canada, and he wanted to know what our conditions were, and I kept in close touch with him right along even before he

(Testimony of Adolph Miller.)

ever got associated with this cattle company, and we expressed our opinions. The only reason that I decided about having him ship the cattle—in fact, he wanted to get the best price that he can get out of the cattle, so I told him the condition of the market, that the best thing for him to do is to sell the cattle on the open market and then he will know that he is getting the best price available for them. As far as I was concerned, 250 cattle to us is one day's slaughter. But I knew if I would have received those cattle at our plant, slaughtered them and paid them their value, I would be the fall guy. He wouldn't think that he got every cent that he was entitled to for these cattle. So in a friendly manner I suggested to him, "You take those cattle into the stockyards and I will try to see that they don't try to steal them from me." That is the reason he diverted those cattle and the reason I [107] signed the diversion on them. The cattle had to be released by the Union Packing Company before they can go into any other place but the Union Packing Company. [108]

* * *

Q. You knew that these cattle came from the corporation, didn't you?

A. I knew that they come from Ray Swanson. I knew Ray Swanson.

Q. Did you have any knowledge at this time of what interest Ray Swanson had personally in these cattle? [110]

A. I did not.

(Testimony of Adolph Miller.)

Q. As far as you went then you didn't know he had any interest in them?

A. Oh, yes, I knew—he told me that he was interested in this particular cattle company.

Q. He didn't tell you to what extent?

A. No, he didn't.

Q. Now isn't it a fact, Mr. Miller, that this 50 cents additional that you paid over the highest bid of the Cudahy Company cost you over \$1300? Isn't that a fact?

A. Yes, I imagine so. It is more than \$1500 because I think the cattle weighed somewhere in the neighborhood of 263,000 pounds, somewhere in that neighborhood.

Q. It cost you over that?

A. That is right.

* * *

Mr. Mahl: For the purpose of the record, Mr. Shipman, [111] Plaintiff's Exhibit 12 is the kill sheets which were furnished me by you, that is, the kill sheets of the Union Packing Company, and I assume that you will stipulate that these are the kill sheets?

Mr. Shipman: You asked for them and I gave them to you.

Q. I show you, Mr. Miller, Plaintiff's Exhibit 12. These are the records of the Union Packing Company, are they not? A. They are. [112]

* * *

Q. Mr. Miller, as I understand the bookkeeping arrangement at your company, the cattle are slaugh-

(Testimony of Adolph Miller.)

tered and the kill sheet is prepared, that is, Plaintiff's Exhibit No. 12, is that correct?

A. That is done right on the kill floor.

Q. In other words, right down on the killing floor you prepare these kill records?

A. Well, each individual beef is weighed and the weights are written down on the killing sheet.

Q. And is this a copy of the kill sheet?

A. That is right.

Q. I am referring to Exhibit 12. A. Yes.

Q. What happens to these kill sheets in the matter of your bookkeeping?

A. Well, they go up to the same office and they are calculated, they are added up and the total weight of that particular day's kill goes into the column of another sheet that we make out.

Q. That is Plaintiff's Exhibits 2-A, B, C and D, is it not, these documents here?

A. That is right. [113]

Q. So that after the kill sheet is made up, that is, Plaintiff's Exhibit 12, that is made up right on the floor where the killing is being done?

A. These sheets?

Q. That is the kill sheets?

A. That is right.

Q. The record is then taken upstairs to your office department? A. That is right.

Q. And Plaintiff's Exhibit 2-A to 2-D, inclusive, is made up, is that correct? A. They add up.

Q. I mean, I am just asking the way you keep those records. Am I correct in that?

(Testimony of Adolph Miller.)

A. That is right.

Q. How soon after the kill sheet is made up by those records, Plaintiff's Exhibits 2-A to 2-D, inclusive, made up?

A. Well, sometimes they are made up the same day as the slaughter, and sometimes they don't make them up until the next day.

Q. They are made up by different people than do the slaughter, is that correct?

A. That is right.

Mr. Mahl: These Exhibits 2-A to 2-D, inclusive, your Honor, have a lot of information with which we are not concerned [114] in this case, and I have prepared a digest of the information from those sheets, with the exception of one column, as to the dressed weight, all off of these sheets. It might be easier if we would refer to this rather than these sheets which have a lot of items on them which are not material.

The Court: Do you want this marked?

Mr. Mahl: I would like to have it marked for identification. I don't think it is properly in evidence.

The Court: We will mark it 2-E for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2-E for identification.)

Q. (By Mr. Mahl): Now, in view of what you have just testified, Mr. Miller, would you kindly look at your kill sheets, Plaintiff's Exhibit No. 12, and am I correct that on none of those kill sheets

(Testimony of Adolph Miller.)

having to do with the cattle in this case is there any grading which is down at the bottom?

A. That is on these sheets here?

Q. That is right.

A. That is right.

Q. None of these sheets have any grading, is that correct? A. That is right.

Q. Well, now, if you will turn to Plaintiff's Exhibits 2-A to 2-D, more particularly to the paper which is taken from there, the beef is graded, isn't it? [115] A. As to our own grade.

Q. Just answer yes or no. It is graded there, isn't it. A. Yes.

Q. And this Exhibit 2-A to 2-D is the one that is made up upstairs off the kill floor and there is this grading on those sheets? A. That is right.

Q. Will you kindly explain to us how the people making up Plaintiff's Exhibit 2-A to 2-D, inclusive, knew what those grades were.

A. The salesman usually goes through the beef the next morning and decides as to what grade they would go in unless they are of good grade or better, then we have them—in other words, if we have any cattle slaughtered and we think that there is any chance of them grading A, we have the man from the Department, the grader from the Department of Agriculture, come in and he grades them, puts roller stamp on these cattle, but that would only apply to our A grade or better.

Q. Isn't it your practice to enter on your kill

(Testimony of Adolph Miller.)

sheets, Plaintiff's Exhibit 12, right down in the killing floor the grades of beef? A. No, sir.

Q. After these beef are slaughtered the carcasses are [116] simply put in a room for aging, aren't they? A. Yes, sir.

Q. What indicia do you have on those carcasses that show from what lot they came?

A. There is tags on each individual side of beef.

Q. In other words, you can trace back?

A. Oh, yes.

Q. Those carcasses hanging in your curing room can be traced right back to the purchaser by the indicia that you put on them?

Mr. Shipman: Do you understand the question?

Q. (By Mr. Mahl): Does the particular carcass hanging here in this room after it is slaughtered and it is aging, is there some mark on that carcass that will show from whom you bought it?

A. We have the lot number on the carcass and even the number of the beef—that goes down by numbers. It is right on the tag. And as the salesman goes in the next day, or if they are better grade of cattle the grader from the Department of Agriculture walks in.

Q. Who puts the grading on the cattle shown on Plaintiff's Exhibit 2-A to 2-D, inclusive?

A. Our salesman.

Q. Where does he get his information from?

A. From looking at the cattle. [117]

Q. Now each head of cattle, Mr. Miller, will have

(Testimony of Adolph Miller.)

a different percentage of dressed beef from it than will other head, isn't that correct?

A. That is right.

Q. In other words, some cattle dress high, the percentage of dressed beef, and others dress low, is that right? A. Yes, sir.

Q. It would be rather unusual, would it not, Mr. Miller, if 243 head would all dress within one hundredth of a per cent of each one, wouldn't it?

A. It would, yes.

Q. Well, then, will you kindly explain why it is that on your records these 243 head of beef all show that they dressed out exactly the same percentage of dressed beef as to weight to the one hundredth of a per cent? Will you explain that to us?

A. Yes, sir. This beef is added up off of the killing sheet and the total weight marked on the killing sheet and then copied into this main sheet and then they added up the total of the dressed weight and then they take the total of the live weight—we don't take each individual beef, we take the whole lot of cattle.

Q. Mr. Miller, will you look at Plaintiff's Exhibit 2-A. It is the top sheet there. And then look at Lot No. 39. A. Yes. [118]

Q. That is beef with which we are here concerned, is it not? A. That is right.

Q. There is 63 head in that lot?

A. That is right.

Q. Under the column of "Yield" you have got— A. 55.02.

(Testimony of Adolph Miller.)

Q. —55.02? A. That is right.

Q. Now that is the average of those 63 head, is it not? A. That is right.

Q. Now will you look down at Lot 43?

A. That is right.

Q. That has to do with 60 head of these cattle, doesn't it? A. That is right.

Q. And that also comes out 55.02.

A. That is right.

Q. For those 60 head? A. That is right.

Q. And if you will look at Lot 54, that consists of 60 head of cattle? A. That is right.

Q. That also comes out 55.02?

A. That is right. [119]

Q. Will you kindly explain how that is, Mr. Miller? Before you answer, are there any other lots here other than the lots of the beef with which we are concerned that average out exactly the same? Will you look at this and tell us?

A. Not unless they are out of the same cattle.

Here is the way we handle our yield on these cattle, figure the yields on them. As you can readily see, there are some parts of these cattle that were killed on the 12th, and then on the 13th, 14th and 15th. Well, the weight is added into our lot sheet and then they are added up, the total dressed weight as against the total live weight, and then they figure what the yield on those cattle is for the total number of cattle in that particular lot.

Q. In that particular lot?

A. That is right.

(Testimony of Adolph Miller.)

Q. My question is, why are every one of these lots the same, with the one exception of the six head, which are Lots 39, 43, 54 and 60, why are they all 55.02 per cent yield?

A. Because we don't figure these cattle in each day. We may take an approximate yield on them but we wait until the entire lot is slaughtered and then add up the total of the dressed weight and figure them into the total of the live weight.

Q. Now will you look at Exhibit 2-B, Lots 47, 46, 48 and 49 are bought from Bassett. Those are heifers. They were [120] all slaughtered on the 13th of October. They were all bought from Basset.

A. Yes.

Q. The dressed weight of the first lot yielded 55.92 per cent, of Lot 46, 53.05 per cent, Lot 48, 56.06 per cent, of Lot 49, 59.86 per cent. Those each have a different yield, have they not?

A. That is right.

Q. Why is that?

A. Because they are all different lots of cattle. And Bassett is our own feed lot. We take those cattle out of our own feed lots and they come out of different lots of cattle and we figure each individual lot separately.

Q. Then you did treat, so far as your records go, these cattle differently than you treated other cattle?

A. No, I did not. If I only had 63 cattle in that lot, why we would have figured the 63 cattle. But if there was 240-some cattle then we add up the

(Testimony of Adolph Miller.)

total number of the cattle, take the dressed weight and the live weight, and then derive our yield on them.

Q. Will you look on Exhibit 2-D, dated October 15. There you have a lot from "Yards," Lot No. 62, which yielded 53.99 per cent.

A. Lot 62?

Q. That is right. And you have on that same day Lot [121] 56 from "Yards" and that yield is a different yield, 56.49 per cent.

A. That is right.

Q. Why weren't they treated the same?

A. Because they were two different lots of cattle.

Q. We are dealing here with five lots of cattle, are we not?

A. No, you don't. You deal with one lot of cattle. They were all bought at the same price, at the same time.

Q. Now of course in order to figure your cost in the cost column on Plaintiff's Exhibit 2-A to 2-D, that cost is naturally controlled by the percentage of yield, is it not?

A. That is right.

Q. So that you would naturally have the same dressed weight cost for all of these cattle with the exception of Lot 37, which is separate, is that right?

A. Cattle coming out of our own feed lots, we don't always take them out on the live cost basis. We put a dressed cost on them and derive as to the live value of them from the dressed value.

Q. Mr. Miller, referring to Plaintiff's Exhibit

(Testimony of Adolph Miller.)

2-A to 2-D inclusive, the cattle coming from the plaintiff in this action are Lots 37, 39, 43, 54 and 60, as shown on that exhibit, is that not right?

A. Is that on this? [122]

Q. Yes. A. 37?

Q. 37? A. Yes.

Q. 39? A. That is right.

Q. 43? A. Yes.

Q. 54 and 60? A. 54 and 60; yes.

Q. That adds up to 248 head of cattle with which we are concerned here, is that right?

A. That is right.

Q. Now, Mr. Miller, between the time of the conversation that you had with Mr. Swanson at Williams Lake and the arrival of these cattle in Los Angeles, the market had dropped off, hadn't it?

A. I imagine it had, yes. [123]

* * *

Mr. Mahl: We might shorten this, Mr. Shipman, if you will stipulate with me that the Union Packing Company had government contract or contracts for the supplying of beef and that those government contracts were canceled in the manner and at the time shown on Plaintiff's Exhibit 13 for identification.

Mr. Shipman: Yes, on the date it shows, the 4th of October.

Mr. Mahl: The date is October 4th on all of these cancellations. They show dates of delivery starting October 1-10, and then the figure 15. They

(Testimony of Adolph Miller.)

are all the same. Each of the five is a cancellation for 40,000 pounds of beef, making a total of 200,000 pounds of beef.

Is that stipulated to?

Mr. Shipman: Yes.

Now let me ask you this: What is the purpose of that?

Mr. Mahl: I think it explains—these cattle left Vancouver on the 28th or 29th and arrived here on the 6th of October—I feel that it explains why the contract was not recognized. Here is 148,000 pounds of beef that he gets from the cattle which we sent, and here is a government contract [124] for 200,000 pounds of beef. That is the purpose of it.

We will offer Plaintiff's Exhibit 13 for identification in evidence.

The Court: It will be received in evidence.

(The documents previously marked Plaintiff's Exhibit No. 13 for identification were received in evidence.)

* * *

Q. Mr. Miller, you received the letter dated November 15th from Mr. Jaffe, together with a statement attached thereto, being Plaintiff's Exhibit 5-A and 5-B, did you not? [125]

Mr. Shipman: We will stipulate to that.

Mr. Mahl: Will you also stipulate, counsel, that he received the letter of November 24th?

Mr. Shipman: So stipulated.

Mr. Mahl: Which is Plaintiff's Exhibit 6.

(Testimony of Adolph Miller.)

Mr. Shipman: So stipulated.

Mr. Mahl: Is it also stipulated that he made no reply to them at all?

Mr. Shipman: So stipulated. [126]

* * *

Mr. Mahl: Your Honor please, Mr. Swanson has advised me that he did not understand the question that I asked him. I talked with Mr. Swanson during the recess only with Mr. Shipman. I would like to put Mr. Swanson back on the stand.

RAY SWANSON

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Mahl:

Q. I believe, Mr. Swanson, you said you did not understand a question of mine and I will re-ask the question.

Q. Did you after the statement of November 15, 1948, was sent to Mr. Miller by Mr. Jaffe, have a conversation with Mr. Miller relative to his paying the bill? Do you understand my question?

A. Yes.

I met Mr. Miller down at the stockyards one day up on the catwalk shortly after the time the bill was made out and I made the remark to him that I was in a tough spot on this deal with Wade and Jaffe because of the way that deal went, and Adolph made a remark back to me, he said, "Well. I will see you

(Testimony of Ray Swanson.)

in two or three days.” And that was all that was said. [127]

* * *

Cross-Examination

By Mr. Shipman:

Q. Now when you speak of a statement you mean this statement?

A. (Examining document): Yes, this is the one.

Q. And I am referring now to Plaintiff's Exhibit 5-B.

Now, Mr. Swanson, you received settlement from the Southwest Commission Company?

A. For the cattle?

Q. For the cattle. A. Yes, I did.

Q. And that was paid by the Southwest Commission Company to the Cariboo Company?

A. Cariboo Land & Cattle Company.

Q. Cariboo Land & Cattle Company.

A. Yes.

Q. No payments of any kind have been made here by the [128] Union Packing Company, were there? Were any payments made by the Union Packing Company?

A. No, it all came from the Southwest Commission Company.

Redirect Examination

By Mr. Mahl:

Q. The Union Packing Company paid this money to the Southwest Commission Company that was in turn paid to the plaintiff, isn't that correct?

(Testimony of Ray Swanson.)

A. They would have to. [129]

* * *

The Court: Before you make your motion, let me inquire of you or Mr. Mahl what is meant by some of this material on Exhibits 2-A to 2-D inclusive. I notice after the lot number there is a column "AA," "A," "B," "C," and "D."

* * *

Mr. Mahl: I think I could answer his Honor and I think you will agree with me.

Column "AA," if your Honor please, is supposed to be for choice. However, the figures appearing there, Mr. Miller states, do not indicate choice but rather possible selling price.

However, the figures in columns "A" to "D" indicate the quality of the dressed beef, A being good, B being commercial, C being utility, D being cutter and E being canner. [130]

* * *

Mr. Shipman: I should like to make a motion at this time, may it please the court, for nonsuit on the ground that the plaintiff has failed to establish a prima facie case or a case which is not barred by the statute of frauds.

The Court: Well, you have two grounds, that no prima facie case has been made and, if I understand you right, even if some contract has been made out, the motion is based upon the ground that the statute of frauds bars the action. [133]

* * *

The Court: Your point is that that is a stronger

case in that there was an element of fraud?

Mr. Shipman: Yes.

The Court: But under the rule of these cases is fraud necessary? The whole doctrine of promissory estoppel rests upon what is common sense, that where somebody has made a promise and the other person relies on it, and changes his position he should not therefore, in equity and in good conscience, be allowed to change the position he has taken to the detriment of the other party. And this case, it seems to me, comes within that category.

Now having in mind that all intendments are in favor of plaintiff's position at this time, it seems to me that in view of the testimony and of the witnesses that have been given in evidence here, that when they shipped these cattle [135] down at the expense of several thousand dollars, certainly there was reliance on the words of the defendant which would take this case out of the statute of frauds, at least for the purpose of the motion.

Mr. Shipman: Except, your Honor, that the plaintiff's own conduct shows that there was no such contract for the reason that he goes ahead, and Mr. Swanson has so testified——

The Court: You mean he tried to sell the cattle?

Mr. Shipman: Yes, the identical cattle in the Canadian market.

The Court: That is a matter that you might argue when the case is concluded, but from the standpoint of what is the plaintiff's strongest position, you have Mr. Miller making an offer. It is a continuing offer until it is revoked. Certainly it

would continue for a reasonable time. Then according to the witnesses for the plaintiff, when they talked to him on the telephone he said to send the cattle down. That would probably constitute an acceptance. And when the cattle started on their way and expenses were incurred, there was reliance which would prevent him from changing his position.

I am going to deny the motion for a nonsuit at this time, without prejudice to raising any points you want to at the conclusion of the trial. [136]

* * *

PAUL F. HILL

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Paul F. Hill.

Direct Examination

By Mr. Shipman:

Q. What is your business or occupation, Mr. Hill? A. Livestock.

Q. Are you a commission merchant?

A. I am.

Q. Where is your place of business?

A. At the Los Angeles Union Stock Yards.

Q. How long have you been in business?

A. At the Los Angeles yards?

Q. Yes, in the livestock business.

A. I have been in the livestock business over 40 years.

(Testimony of Paul F. Hill.)

Q. And at the stockyards?

A. Since 1922, in November.

Q. Do you know Mr. Miller? A. I do.

Q. Do you know Mr. Swanson? A. I do.

Q. Do you know Mr. Wade or Mr. Jaffe?

A. I have met the gentlemen today. [140]

Q. You knew Mr. Swanson and Mr. Miller in 1948, did you? A. I did.

Q. Did you have an occasion to have any conversations with them in regard to cattle shipped from Canada by the Cariboo Land & Cattle Company? A. I did.

Q. Who was the conversation with?

A. Mr. Miller and Mr. Swanson.

Q. Where was the conversation?

A. In my office at the Union Stock Yards.

Q. Can you tell us when that conversation was held? A. No, I cannot.

Q. At the time of this conversation were the cattle in the yards as yet or not, or were the cattle in Los Angeles? A. They were not.

Q. This conversation was before the time the cattle arrived? A. That is true.

The Court: How long before they arrived?

The Witness: I couldn't definitely state that, your Honor. It was several days.

Q. (By Mr. Shipman): Can you tell us what conversation you had with them?

A. Well, they came into my office and said that Ray [141] had some cattle that he had loaded out of Canada that were consigned to the Union Packing

(Testimony of Paul F. Hill.)

Company and that he had decided that he wanted to try the open market and that they wanted to divert the cattle and let me see what I could do with them on the market.

The Court: Who is Ray?

The Witness: Mr. Swanson.

* * *

Q. Who said that?

A. I couldn't honestly answer that. They were both together and I talked to both of them. I don't really know which one did say that.

Q. Did they say anything to you that the cattle had been shipped to Mr. Miller?

A. He said the cattle were consigned to the Union Packing Company.

Q. Was there anything said about the Union Packing Company not taking the cattle?

A. No, there was nothing said about them not taking. The only conversation I had was that they decided to send the [142] cattle to the Union Stock Yards and sell them on the open market.

Q. Did you tell Mr. Swanson that the cattle would have to be diverted? A. Yes, I did.

Q. Did you tell that also to Mr. Miller?

A. Yes, they were together.

Q. Who prepared the diversion order?

A. My office did—possibly I had better say it like this: In order to divert cattle you have to have the car numbers that they originated in. Mr. Swanson had loaded the cattle up north so he gave those car numbers to my office and we, in turn, copied

(Testimony of Paul F. Hill.)

them down and Mr. Miller sent one of his men upstairs, that is, to the railroad office at the Union Stock Yards, and gave them the car numbers and diverted the cattle to the Southwest Commission Company.

Q. From then on did you have any further conversations with Mr. Miller or Mr. Swanson together?

A. Not that I recall; not at that time. I had conversations with Mr. Swanson because the cattle were delayed and we were trying to find them en route.

Q. How long were they delayed?

A. Several days would be all I could answer to that. [143]

* * *

Q. Did you have any conversations with either of them before the cattle arrived?

A. Oh, yes, I saw Mr. Swanson practically every day.

Q. But not Mr. Miller? [144]

A. Well, that I don't recall. I see him almost every day, but I have no occasion to talk with him, I mean about these particular cattle. The cattle hadn't arrived.

Q. What did you do after the cattle came into the yards, did you sell them?

A. No, the cattle came in—as I recall it was on a Thursday. If you have a calendar I can tell. It is October 7th at 2:30 in the afternoon when they arrived at my yards and they were in bad condi-

(Testimony of Paul F. Hill.)

tion, and we decided, or rather I decided, not to show the cattle at all as they needed several days rest due to the bad shipment.

* * *

Q. Did you sell them eventually?

A. I did.

Q. Did you obtain an extension of time during which these cattle could be sold for slaughter?

A. I did.

Q. How long an extension of time did you obtain?

A. As I recall, the time limit on these cattle was out [145] on Tuesday and I got in touch with Washington on Monday and got an extension for the cattle until the following Friday.

Q. What was the amount of time that you asked for?

A. I asked for 10 days.

Q. That time, however, was that sufficient for you to sell the cattle?

A. It was.

Q. And you sold the cattle?

A. I sold the cattle on the 11th of October.

Q. And you sold the cattle to the Union Packing Company?

A. I did.

Q. Did the Union Packing Company pay you for the cattle?

A. They did.

Q. Did you make account sales and payment for the cattle?

A. I did.

Q. I will show you Plaintiff's Exhibit 7 and ask you whether you have seen this before.

A. This is my account sale. That is the account of the sale of the cattle.

(Testimony of Paul F. Hill.)

Q. Do you remember in relation to the price which you got from the Union Packing Company for these cattle whether it was as high or higher than any other price that you were [147] able to get?

A. It was much higher.

Q. Did you charge a commission for the sale of the cattle? A. I did.

Q. Who paid the commission?

A. Cariboo Land & Cattle Company.

Q. Did Mr. Swanson see you every day about the sale of these cattle?

A. Yes, he was there every day, I would say.

Q. Do you remember of your own recollection and knowledge the condition of the cattle when they came in here? A. I do.

Q. What do you remember about their condition?

A. Well, they were in very bad condition, completely tired out, exhausted, you might say, and there were several head very badly bruised, and sore-footed, and just in bad condition.

Q. You didn't show them then primarily because of the condition for a few days after arrival?

A. I didn't show the cattle on Friday, which was the day following the date that they arrived, and of course Saturday we are closed, Sunday we are closed, and Monday when I brought the cattle out to sell them I only had until Tuesday because the cattle were billed for slaughter purposes only, and you have 14 days from the date of arrival in the United States in which to have the animal

(Testimony of Paul F. Hill.)

slaughtered. Due to the bad handling by the railroad these cattle were unloaded eight times from the point of entry to their destination. So I really had one day in order to show the cattle on the market until I got the extension.

* * *

Cross-Examination

By Mr. Mahl:

Q. Mr. Hill, the condition of these cattle when they arrived in Los Angeles was such that Mr. Miller was willing to pay 50 cents more than anyone else, isn't that correct, for them?

A. When they arrived in Los Angeles?

* * *

Q. In any event, the end result is that Mr. Miller paid more than anybody else?

A. That is true. [149]

* * *

Q. The Union Packing Company is not engaged in the commission business of selling cattle, are they?

A. No, not that I know of.

Q. Now the commission that you received was received by you by reason of the Union Packing Company sending to you a check, you deducted your commission and remitted the balance to Cariboo, isn't that right?

* * *

A. Well, the Union Packing Company remitted to me for it—you might say, it wouldn't be gross, it would in a sense—anyway, for the amount of money that the cattle came to over the scales, and

(Testimony of Paul F. Hill.)

I in turn deducted the freight and handling charges.

Q. And your commission?

A. That is right, handling charges.

Q. And remitted the balance to Cariboo, that is correct, isn't it? A. Yes, sir.

Q. In other words, you never received a check from [150] Cariboo for your commission, you merely deducted it? A. No, sir.

The Court: Is it customary for commission agents to deduct freight and various charges?

The Witness: Absolutely.

* * *

Q. Do you remember saying anything to me in substance that it was Mr. Miller's responsibility?

A. No. From the start of this deal Mr. Miller had told me that he and Mr. Swanson were the best of friends and he wanted him to get all that he could out of these cattle. I remember that.

Q. You didn't feel, at the time that you were discussing it with Mr. Miller, that he was obligated here?

A. I had no reason to think it at all, except that they came to me and diverted the cattle and he impressed upon me [151] every time I talked to him about it that he wanted to favor Mr. Swanson.

* * *

Q. That is, Mr. Miller said that?

A. That is true.

Q. That he impressed on you that he wanted to favor Mr. Swanson?

A. He wanted to get all he could for his cattle.

(Testimony of Ray Swanson.)

RAY SWANSON

called as a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

The Court: You are calling Mr. Swanson as your witness? He is no longer an employee but he was at the time of this transaction.

Mr. Shipman: I think the rule so applies.

The Court: You are calling him under Rule 43(b)?

Mr. Shipman: Yes.

The Court: Very well.

Cross-Examination

By Mr. Shipman:

Q. Mr. Swanson, I understood you to say that you tried to make a sale of these same cattle before they were shipped. A. Down here?

Q. Yes. A. Yes, I did.

Q. Where did you try to sell them?

A. I tried to sell them in Williams Lake and I tried to sell them in Vancouver.

Q. And that was before the shipment was made from—— A. Vancouver.

Q. ——from Vancouver?

A. That is right. [153]

Q. Did you also try to make sale of the same cattle from Williams Lake?

A. I didn't quite get the point.

Q. While you were at Williams Lake and before you went to Vancouver, did you try to sell them?

(Testimony of Ray Swanson.)

A. I tried to sell them there. In fact, I had them sold and the man in the packing company backed out.

The Court: I think we covered all that before.

Mr. Shipman: Yes, There is only one thing I want, your Honor, and that is whether an attempt was made to make a sale in Vancouver.

Q. Did you try to make a sale in Vancouver?

A. Yes.

Q. And the cattle were actually in Vancouver at the time? A. Right in the yards.

Recross-Examination

By Mr. Mahl:

Q. At the time of the attempted sale in Vancouver that you said you attempted to make, there was still over 250 head at the ranch, was there not?

A. I didn't hear you.

Q. At the time the cattle were in Vancouver, Mr. Swanson, there were considerably over 250 head of cattle at the [154] ranch, were there not?

A. Oh, yes.

Mr. Mahl: That is all.

Mr. Shipman: What were you trying to sell while you were in Vancouver?

The Witness: The cattle I had in Vancouver.

* * *

ADOLPH MILLER

called as a witness by and on behalf of the defendant, having been duly sworn, was examined and testified as follows:

(Testimony of Adolph Miller.)

Direct Examination

By Mr. Shipman:

Q. Mr. Miller, do you remember more than one conversation with Mr. Swanson when he was at Williams Lake?

A. I think we had two talks, one in the forenoon and one in the afternoon. I am not quite positive but I think [155] there were two conversations.

Q. Now according to your recollection, what took place in the first conversation and what took place in the second conversation?

A. Mr. Swanson, as I recollect, called me and wanted to know what our market was like in Los Angeles, and I told him that we had a very sloppy market, and I also told him I thought, just merely as a friend of his, that I thought he would be better off to sell those cattle right there at home.

Q. Now if there were two conversations, do you think they were the same day?

A. If there were I think they would be, yes.

Q. Was there anything different said at the second conversation?

A. If I recollect, I think that I told Mr. Swanson in the second conversation—whether it was in the first or the second I don't recollect—that he would be better off to ship those cattle to the Union Sock Yards where he can probably get more bidders on the cattle and be satisfied, that if he had to ship them he would probably get a better price for them than I might be able to pay him if they come in for slaughter to me. In which he answered me—I would

(Testimony of Adolph Miller.)

like to finish that—that there was some hardship or red tape of shipping the cattle to a public market, and that it would be easier to ship them to the yards, to packers, and then divert [156] them into the Union yards.

I think that was the conversation that I had with Mr. Swanson from Williams Lake.

The Court: Anything further?

Q. (By Mr. Shipman): Mr. Miller, you testified that you tried to get Mr. Swanson after the receipt of the telegram. A. That is right.

Q. Were you going to talk to him?

A. Was I going to talk to him? A. Yes.

Q. Yes, sir.

Q. About what?

A. Still to explain what our conditions are in Los Angeles.

Q. And what else? A. That is all.

Cross-Examination

By Mr. Mahl:

Q. The first conversation—and I am not trying to commit you that there were two conversations; you have said you cannot recall—but the first conversation I think you said you told him the market was sloppy in Los Angeles, is that right? [157]

A. That is right.

Q. Now at which of these conversations, or was it at one conversation, that it was talked about sending you the cattle?

A. Well, it was in one of the two conversations.

(Testimony of Adolph Miller.)

Q. Let us take the two conversations together—and I am not trying to pin you down to whether it was the first or the second; just what was said between you and Mr. Swanson that day—there was something said about sending the cattle to the Union Packing Company, wasn't there?

A. He told me that the cattle were ready to ship and he thought there might be a chance to sell the cattle along [158] the road or even in Williams Lake. I imagine that would have been the first conversation.

Q. There was conversation that day about sending them to the Union Packing Company? I think you have already said there was, but I want to get the record clear.

A. I imagine that there was.

* * *

Q. Now would you say that this conversation took place from Williams Lake between September 24 and September 27, having in mind that the telegram was dated September 28th?

A. I would imagine so. [159]

* * *

Q. Again I ask you if the price was \$47 to \$50 for commercial, 350 to 600, is that a bad price?

A. It must have been or I wouldn't have told him that.

* * *

Q. Isn't the condition of your market pretty well set by these quotations from the Department of Agriculture? A. No.

(Testimony of Adolph Miller.)

Q. You would accept these as being correct statements, wouldn't you.

A. Pretty much, yes. [161]

* * *

The Court: How much margin would you figure to make on beef? Suppose you paid 40 cents a pound, or \$20 a hundred for dressed beef, what would you think you could make on it?

The Witness: Our business is operated on an average of about $11\frac{1}{2}$ per cent. We are very happy if we can make $11\frac{1}{2}$ per cent net profit.

The Court: On the turnover?

The Witness: That is right; net profit. [162]

* * *

The Court: Is it the price at which a packing company like the defendant would buy cattle for, or is it a price at which they would be selling meat?

* * *

The Witness: Selling.

* * *

Mr. Mahl: The prices I quoted from are based on sales by packers and wholesalers to retailers and hotel supply houses. Those are the prices.

The Court: Very well. He has so testified. [163]

* * *

The Court: When you received this wire, Plaintiff's Exhibit 1, you had your secretary put in a telephone call for Mr. Swanson?

The Witness: Either that or I might have put in that call myself.

(Testimony of Adolph Miller.)

The Court: You really wanted to get in touch with him? [164]

The Witness: That is right.

The Court: You tried to get in touch with him?

The Witness: That is right.

The Court: You were concerned, were you, when you saw this wire about 10 cars leaving noon today?

The Witness: Well, I was concerned to this extent, I knew what our market conditions were and Ray Swanson—I wanted to see that he got the best deal that he can on these cattle. I understood that Ray Swanson was interested in that cattle company.

The Court: But a day or so before you talked with him and told him if he could not sell them to send them on down, did you not?

The Witness: I don't really remember whether there were words to that extent, but I imagine that is probably what I told him.

The Court: Then why were you surprised when you got a wire that 10 cars were coming down?

The Witness: Well, I thought that he might be able to market them right there at better advantage at that point in British Columbia than he would by shipping them to Los Angeles.

The Court: Did you interpret this wire to mean that they were shipping these cattle to you or sending them down to the Union Stock Yards? [165]

The Witness: No, I really didn't know just what he was doing, but I figured he probably was shipping them to me.

The Court: You buy a lot of cattle, do you not?

(Testimony of Adolph Miller.)

The Witness: That is right.

The Court: Are you active? Are you one of these executives that spend your time playing gin rummy or golf, or do you work at your job?

The Witness: It all depends. Sometimes I am active.

The Court: You do a lot of buying yourself?

The Witness: Not now I don't.

The Court: Well, in 1948?

The Witness: I didn't do too much of it then either.

The Court: You talk to numerous people about deals on cattle, do you?

The Witness: I do.

The Court: What I am getting at, do you have so many of these conversations about cattle that it is hard for you to remember a particular conversation, about this particular lot?

The Witness: Yes, sir, I do. I have various conversations with different people in different parts of the country.

The Court: At this time when you talked with Mr. Wade, either in person or over the telephone, did you ever say to him that you would pay him 46 cents a pound dressed?

The Witness: I did not.

The Court: Or 2 cents for offal? [166]

The Witness: No, sir.

The Court: You did not?

The Witness: No, sir.

(Testimony of Adolph Miller.)

Cross-Examination

(Continued)

By Mr. Mahl:

Q. Your attempt to reach Mr. Swanson was the day you got the telegram? A. Yes, sir.

Q. And you tried to reach him because of the chaotic conditions of the beef market, is that right?

A. That is right.

Q. I show you one of these statements, Plaintiff's Exhibit 14, the last page, for the market conditions September 28 to 30, which reads: "Beef: Good steer showed a better representation than during previous weeks." Did you agree with that statement?

A. It is a Government report. That is probably what it is.

Q. That statement was made by the Government at the time you say you were trying to get Mr. Swanson to tell him [167] not to send the beef down because of the chaotic conditions of the market?

A. It probably was.

* * *

The Court: I think we had better come back tomorrow morning at 10:00 o'clock.

Let me tell you so you can cogitate about this during your leisure hours and be able to direct my attention to those things I am interested in. [168]

Unless you can convince me differently, I am inclined to agree with the law on equitable estoppel or promissory estoppel. I think this case hinges on

a question of fact. I do not think there is very much law involved in it, because if there was an agreement orally then I think promissory estoppel would apply.

There are two things that concern me about this case that it is hard to decide. It involves the conduct of human beings, why people do certain things, which is a very difficult thing to determine, certainly for a judge, and I take it sometimes it is difficult for a person himself to determine why he did something. But here are two businessmen, executives of the plaintiff corporation, who ship 10 carloads of cattle from Canada to Los Angeles. It is hard for me to believe that if they had not had the conversations which they claimed they had with Mr. Miller that they would have shipped the cattle. Mr. Miller says that he does not recall or that there was no such conversation. It would certainly be very bold and daring for an executive of a cattle company to gather up 250 head of cattle, 10 carloads of cattle, and ship them to a man 1400 miles away. That bothers me.

On the other hand, the other point is the matter concerning Mr. Miller's conduct when the cattle came. Had these men just shipped cattle to him without any understanding on his part that they were coming down, what would the ordinary [169] man have done? If I were Mr. Miller and I was in business and the plaintiff corporation purported to ship me 10 carloads of cattle that I had no contract with and hadn't ordered, I probably would have "blown my top." I am a pretty reasonable sort of

fellow most of the time, but I probably would have said, "What is going on here? You fellows are shipping me cattle that I didn't order." And then you find him proceeding to assist in arranging for the sale elsewhere. [170]

* * *

Your Honor, I have here a case in 97 F. (2d) 420, *Wood v. Moore*. I think the reading of the whole case is necessary, your Honor. It bears very much upon the point here involved.

The Court: How long a case is it?

Mr. Shipman: It consists of about 8 pages, your Honor.

The Court: Hand it up to me and I will look at it.

(The volume referred to was passed to the court.)

The Court: There is no contention in this case of equitable estoppel, is there?

Mr. Shipman: Yes, sir. The court, on page 409 especially, discusses that matter.

The Court: It is not shown in the headnote. Point out to me where there is anything about equitable estoppel. Maybe we can save some time. It is a case where, on the facts, the court held that they had not sustained their burden of proof to take it out of the statute of frauds.

Mr. Shipman: Right here, your Honor. (Indicating.)

The Court: I know, they discussed the question of estoppel as to the agent's authority in writing.

Mr. Shipman: That is right.

The Court: But I can find no discussion about reliance or change of position.

Mr. Shipman: It states:

“We see no reason for applying a different rule in respect to this contention than that applicable [194] where estoppel is claimed with respect to the statute of frauds proper. In the latter case it is necessary to show not only a change of position to the injury of the party asserting the estoppel, but also that there has been a conduct on the part of the opposite party amounting to a representation that he will not avail himself of the statute to escape his agreement.”

The Court: Read that last sentence again.

Mr. Shipman: “* * * but also that there has been a conduct on the part of the opposite party amounting to a representation that he will not avail himself of the statute to escape his agreement.”

The Court: With all due respect to my superior, Judge Stephens, I do not think that that is the law. I think that goes too far. That case is a diversity of citizenship case, is it not, the one you are reading from?

Mr. Shipman: Yes.

The Court: In a diversity of citizenship case we are bound by the law of the state in which the case is tried. I am bound by California law, and from what I have read of these California cases I think that that is a very narrow construction, if that is what the court means.

Mr. Mahl: May I inquire as to the date of that case? The Court: 1938. [195]

Mr. Shipman: May 27, 1938.

The Court: What does he cite in support of that statement?

Mr. Shipman: Seymour v. Oelrichs, the identical case.

The Court: 156 Cal.?

Mr. Shipman: Yes.

The Court: Does he cite any of the later California cases? [196]

* * *

Memorandum of Opinion

The Court: I have not been on this bench very long and I have not tried as many cases as some of the other judges have, but this is probably the closest case that I have had to decide since I have been on this bench. It is difficult to determine just what the situation is because of the disputed facts.

Sometimes when it is difficult to determine what happened by listening to testimony of witnesses, having in mind that they are human beings and they may not remember, may not want to remember, may honestly be unable to remember, or may remember wrongfully, it is helpful to drop back upon facts which are not dependent upon the memory of human beings. I am inclined to think that in this case there are facts of that kind which assist in arriving at a decision.

In this case I am inclined to think that it was a continuing offer rather than a contract on September 10th; that the plaintiff, by virtue of the tele-

phone conversations had from the north, was justified in sending the cattle on south relying upon the offer not having been revoked; that although it was only an oral agreement the doctrine of promissory [203] estoppel applies and it would create an unconscionable hardship to permit the defendant to plead the statute of frauds. And I conclude that the plaintiff is entitled to judgment. I have checked the computations made by the plaintiff's attorney, and it seems to me that \$12,503.17 is the correct amount.

Now to get back to these facts which help, aside from the testimony of witnesses, to decide this case. The defendant had contracts with the Army. I have not checked them this morning but it seemed to me that the price of the meat was approximately 69 cents a pound, or at least it was in the 60 cent bracket. These contracts were canceled on October 4th. The Army contracts totaled some 200,000 pounds of meat. As long as those contracts continued, whereby the defendant could process meat and sell it for some 60 cents, he could well have afforded, regardless of what happened to the market, to have bought this meat at 46 cents and not necessarily used this meat to fulfill the contract, but lots of meat was being handled and it just meant that here was 146,000 pounds of meat available for his needs. But the minute those contracts were canceled, and the record does not show that he knew beforehand that they were going to be canceled, but the practical matter is that somewhere before the 4th of October probably he had some notice of it,

certainly he did on October 4th, that he was not going to need as much meat as he had needed [204] before. Secondly, he was not in a position to take 46 cent meat and turn it over at a profit as he could under the Army contracts.

Secondly, the physical facts of the market are shown by the Exhibits 14 and 15, and are most significant in that apparently during the month of September the market was up pretty fair, 47 cents, 48 cents, 50 cents. Mr. Miller has testified that his profit on turnover was a very minor one of 1 per cent or more on the turnover. It was obvious, therefore, that with the market in that shape he could have taken this meat, turned it over and made money. But then happens one of those strange things—why it should happen while these cattle were en route no one can say—but the market drops and it would not have been possible to turn the meat over.

I attach significance to those two facts, not dependent upon human testimony, as being the possible explanation of why Mr. Miller's attitude changed and he contended that he had no deal.

It is hard for me to believe that two men in business, such as the officers of the plaintiff corporation, would have shipped 10 loads of cattle unless they were relying upon the conversations which they testified to and the conversations from the north indicating that they had a deal, indicating that Mr. Miller was willing to take the cattle at the 46 cent price. [205]

As to Mr. Miller, I am inclined to think that

maybe he has so many conversations about stock, cattle, so many duties in connection with his business, that he may not even have recalled some of the conversations that he had. It is entirely possible that in the hurry of business a man might make a commitment and then possibly not be able to realize that he had made it, and that someone else had relied upon it.

In preparing findings I want the plaintiff to show how you arrive at the amount of the figure in the judgment. I am not going to be one of these judges who has to have a post-mortem on his case after the Circuit decides, either to show that the Circuit was wrong or he was right, but I have read a number of decisions from the Circuit recently in which District Courts have been reversed because there was no explanation so that the Circuit Court could understand how the District judge arrived at the decision. Therefore, for the purpose only of avoiding retrials of actions and not to benefit me in any false pride in being affirmed in the case, will you see to it that your findings show how you arrived at the amount of this judgment?

I want to compliment both counsel. The case was well tried and you were both well prepared and you did not waste time over facts which were not in dispute.

As I see it, the case rests upon a question of fact. I [206] do not think that the law is seriously in dispute.

Mr. Shipman: I would like to call your Honor's

attention to one matter. The court has naturally, as anyone sitting upon the bench and listening to two opposite stories might attach itself to some stray matters, but your Honor's conclusion in regard to the contract for the Army, or whoever it was, I must say is erroneously stated for the reason, may it please the court, that when the court refers to a price of 60 cents a pound, in fairness to the defendant the court must have observed that it is a boned price. In other words, it is pure meat with the bone cut out. Therefore unless that matter was not material to the case, and to be fair and just to the defendant, I think it would be necessary to take that into account for the purpose of determining the difference in weight, if that probative fact is important.

The Court: I stand corrected. I should have noticed that there was some processing in the price involving 60 cents. However, I think it would be logically correct that the contract undoubtedly was of some value to the defendant. It was a profitable contract, because the Army apparently terminated it upon the ground that they could purchase meats at a cheaper price. At least that is stated in the exhibit.

Mr. Shipman: Yes. And those cancellations, may it please the court, took place after the transaction between Mr. Miller and Mr. Swanson. [207]

The Court: They took place before the cattle arrived in Los Angeles?

Mr. Shipman: That is correct, but after the arrival of Mr. Swanson.

The Court: I have that in mind.

Mr. Shipman: I just wanted to be fair to the court in that respect.

* * *

The Court: Counsel, I find that there was a telephone conversation in which Mr. Swanson talked to Mr. Miller and Mr. Miller said, "Send the cattle on down, I have got a deal." Therefore they sent the cattle down in reliance on his previous arrangement that he would pay 46 cents a pound, and when they shipped the cattle the cost of the shipping and the cost of the customs duties was reliance and a change in position which bound him to the oral agreement. [208]

If I am wrong on the law you have your remedy of appeal. It is a lot easier to appeal on questions of law than it is on questions of fact. I have ruled against you on your view of the law; therefore it is an easier kind of an appeal to take. [209]

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 26th day of June, A.D. 1950.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed September 11, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 37, inclusive, contain the original Complaint for Money; Answer; Objections of Defendant to Form of Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Order of Court; Undertaking on Appeal and to Stay Execution; and Designations of Record on Appeal and a full, true and correct copy of minute order entered July 25, 1950, which together with Copy of Reporter's transcript of proceedings on June 20 and 21, 1950, and original Plaintiff's Exhibits 1, 2-A to 2-E, 3-A, 3-B, 3-C1 to 3-C-8, 4-A to 4-D, 5-A, 5-B, and 6 to 15, all inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 2nd day of October, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12703. United States Court of Appeals for the Ninth Circuit. Union Packing Company, Appellant, vs. Cariboo Land & Cattle Co., Ltd., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 3, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals for
the Ninth Circuit

No. 12703

CARIBOO LAND & CATTLE CO., LTD., a Corporation,

Plaintiff and Appellee,

vs.

UNION PACKING COMPANY, a Corporation,
Defendant and Appellant.

STATEMENT OF POINTS UPON WHICH DEFENDANT AND APPELLANT INTENDS TO RELY ON APPEAL (RULE 19-6)

Pursuant to Rule 19, Subdivision 6, of this Court, Defendant and Appellant hereby designates the points on which it intends to rely on appeal:

I.

The Findings of the Trial Court do not support the judgment.

II.

The Findings of the Trial Court are self-contradictory and outside the issues in material respects.

III.

The evidence does not support the Findings of the Trial Court.

IV.

The judgment and decision is against law.

The judgment is erroneous in enforcing an as-

serted oral contract for the purchase of cattle of a value of more than \$50,000.00, which is invalid under the Statute of Frauds.

Dated: October 12, 1950.

/s/ BENJ. W. SHIPMAN,
Attorney for Defendant and Appellant Union Packing Company.

Receipt of copy acknowledged.

Endorsed]: Filed October 14, 1950.

[[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between counsel for the respective parties to this appeal that the exhibits introduced during the trial of the cause in the United States District Court may be considered in their original form by the Court during the consideration of the appeal taken without reproduction, and that, in the meantime, said exhibits may be returned to the trial court and there be made available to the respective parties to this appeal in the course of the preparation thereof.

Dated: October 23, 1950.

/s/ FREDERICK D. WAHL, JR.,
Attorney for Plaintiff and
Appellee.

/s/ BENJAMIN W. SHIPMAN,
Attorney for Defendant and
Appellant.

It Is So Ordered.

/s/ WILLIAM DENMAN,

Chief Justice.

/s/ WILLIAM HEALY,

/s/ H. T. BONE,

Judges U. S. Court of Ap-
peals for the Ninth Circuit.

[Endorsed]: Filed October 27, 1950.

No. 12703

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACKING COMPANY,

Appellant,

vs.

CARIBOO LAND & CATTLE CO., LTD.,

Appellee.

BRIEF OF APPELLANT UNION PACKING COMPANY.

BENJAMIN W. SHIPMAN,

511 Pacific Mutual Building, Los Angeles 14,

Attorney for Appellant.

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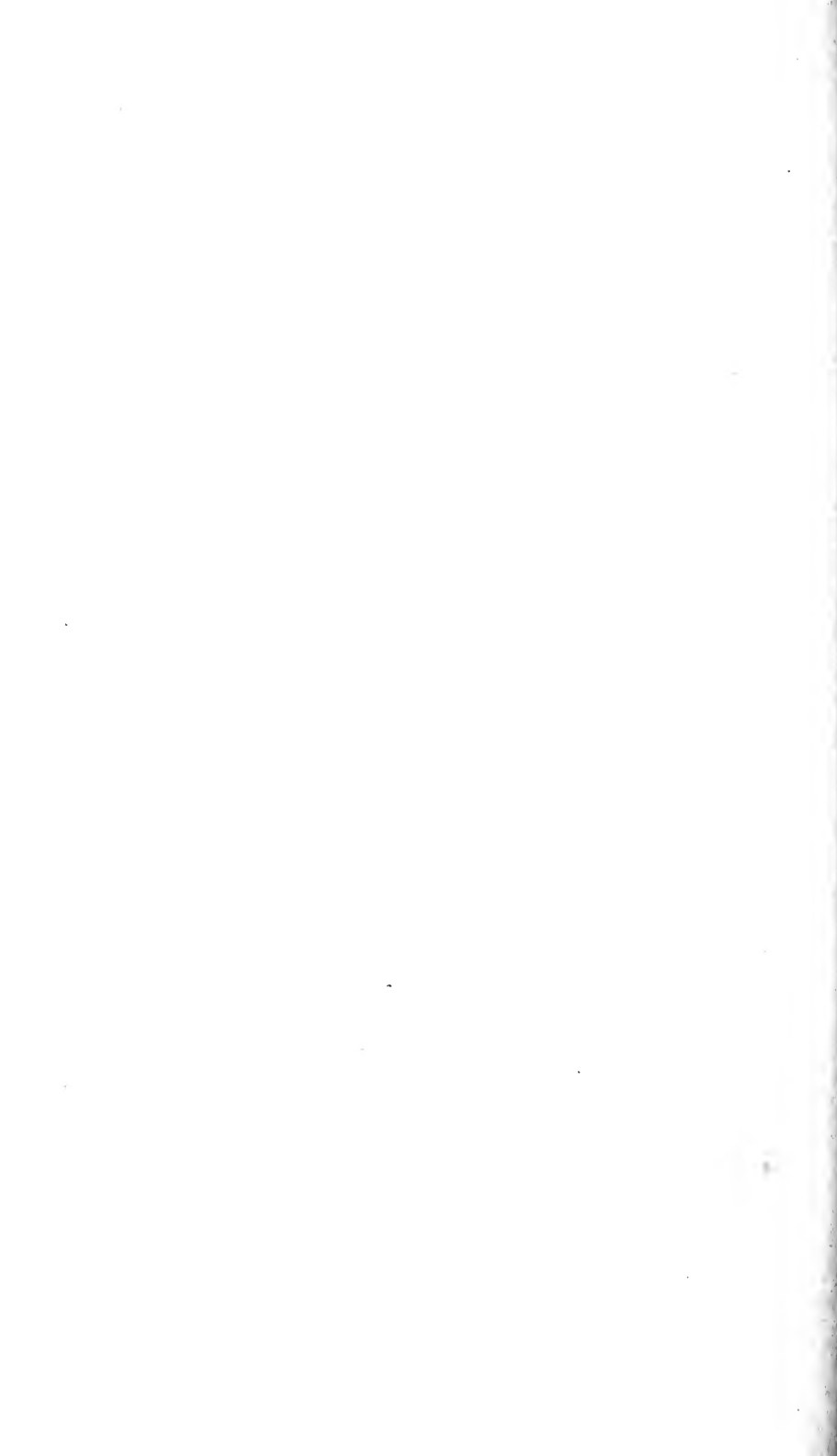
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No. 12703

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNION PACKING COMPANY,

Appellant,

vs.

CARIBOO LAND & CATTLE CO., LTD.,

Appellee.

**BRIEF OF APPELLANT UNION PACKING
COMPANY.**

Introductory Statement.

Appellant (defendant in the Court below) appeals from the judgment in the amount of approximately \$14,000.00 rendered against it in a diverse citizenship action by appellee, a Canadian corporation.

The case was tried before the Honorable James M. Carter, a jury having been waived. The suit was for accounting by reason of defendant's alleged failure to pay for 248 head of cattle of a value of more than \$50,000.00. No written contract was asserted, but plaintiff showed freight and customs expenditures, and the Trial Judge held that a case of promissory estoppel was made, taking the case out of the statute. At the trial it was admitted that appellant had refused to accept delivery from plain-

tiff, but had purchased the cattle later from a commission company on the open market.

There was a direct conflict in the evidence between plaintiff's own witnesses with respect to the asserted oral contract—so much so that the Trial Court stated on this issue:

“This is probably the *closest* case that I have had to decide since I have been on the bench.” [R. 123.]

Plaintiff and appellant's officer had some conversations with respect to plaintiff's cattle on September 8th and 10th. The Trial Court concluded that while no contract was made at that time, appellant's officer made an offer which was “a continuing offer” and that this was probably accepted when plaintiff shipped the cattle 18 days later. [R. 102, 123.] Conclusions I and II [R. 19] are in accord with the foregoing statement of the Court, but contrary to Finding V [R. 9] which intimates that an agreement was made on September 8th, and Finding VI which indicates a confirmation of this agreement on September 10th [R. 9-10].

After a telephone conversation with appellant's officer on or about September 27, 1948, in which appellant's officer suggested that efforts be made to sell the cattle in Canada before sending them to Los Angeles, plaintiff attempted to make such sale at Williams Lake near the ranch. In fact, a sale was agreed upon to a Canadian buyer who later refused to carry out the contract. Again efforts were made to sell the cattle at Vancouver, B. C.,

and when these failed, they were shipped to Los Angeles consigned to appellant, who refused to accept. With the consent of plaintiff's officer, they were diverted to the Union Stockyards for sale and ultimately purchased by appellant from a commission merchant.

The complaint alleges that the cattle were delivered to appellant [Par. IV; R. 4], and asks for an accounting of the balance of the purchase price. Finding XVIII [R. 14] is that defendant *refused to accept* delivery of the cattle, and that by reason thereof "plaintiff necessarily permitted" appellant to divert the cattle [R. 15]. The conclusion of the Court [R. 20] is that appellant's "*refusal to accept* said cattle . . . constituted a breach of the contract"

The Trial Court finds a refusal to accept delivery and a breach of contract by appellant, but, nevertheless, orders judgment for the full amount of the purchase price, *i. e.*, \$70,357.22, less the amount received from the commission house, and is in reality a judgment of specific performance. There is no finding that the plaintiff was damaged in any sum whatsoever at any time.

The Trial Court refused to consider the defense of the statute of frauds and frankly stated that, if he found there was an oral agreement to purchase the cattle, he would hold the defendant bound on the principle of promissory estoppel. [R. 102, 120.] The Trial Court was so obsessed with the idea of promissory estoppel that he refused to consider any cases other than *Scymour v. Oclrichs*, 156 Cal. 782. When his attention was called to a decision by this

Court, opinion by Justice Stephens, in *Wood v. Moore*, 97 F. 2d 920, he refused to accept the principle of that decision, stating:

“The Court: *With all due respect to my superior Judge Stephens, I do not think that that is the law. I think that goes too far.*”

Instead of considering the question of the statute of frauds further, the Trial Court merely stated:

“If I am wrong on the law, *you have your remedy of appeal*. It is a lot easier to appeal on questions of law than it is on questions of fact. I have ruled against you on your view of the law; therefore, it is an easier kind of an appeal to take.” [R. 128.]

Appellant's contentions on appeal are:

I. There was no proof of any oral contract between plaintiff and appellant.

II. The oral contract asserted was within the statute of frauds and there was no proof of any facts which would take this case out of the operation of the statute.

III. The Findings do not support the judgment.

BRIEF OF THE ARGUMENT.

I.

There Was No Proof of Any Oral Contract Between Plaintiff and Appellant.

No enforceable contract was shown for the reason that the contract terms are so indefinite and uncertain that it is impossible to ascertain what promise was being made and what promise was being accepted.

McClintock v. Robinson, 18 Cal. App. 2d 577, 582;

Restatement, Contracts, Sec. 19;

California Civil Code, Sec. 1580;

12 *Am. Jur.*, p. 518, Sec. 21;

National Bank v. Hall, 101 U. S. 43, 44-5, 49-50;

Meux v. Hogue, 91 Cal. 442, 448.

It is essential in a case coming within the purview of the statute of frauds that the evidence of the asserted oral agreement be clear and unequivocal.

Hambey v. Wise, 181 Cal. 286, 289;

Blum v. Robertson, 24 Cal. 127, 143;

23 *Cal. Jur.* 466.

II.

The Oral Contract Asserted Was Within the Statute of Frauds and There Was No Proof of Any Facts Which Would Take This Case Out of the Operation of the Statute.

The Uniform Sales Act was adopted in California in 1931.

Civil Code, Secs. 1721, 1800.

The uniform law provisions relating to the statute of frauds appear in Civil Code, Section 1724, and Code of Civil Procedure, Section 1973(a).

Uniformity of interpretation and application is a primary necessity of the decisions under the uniform laws.

Charles Nelson Co. v. Morton, 106 Cal. App. 144, 149;

Utah State National Bank v. Smith, 180 Cal. 1, 3, 4;

C. I. T. Corporation v. Panac, 25 Cal. 2d 547, 552.

The stability and certainty of the rules of commercial law

“ . . . are of more importance than any fancied benefits which might accrue from any innovation upon the system.”

Aud v. Magruder, 10 Cal. 282, 291-2.

Under the rule of *Seymour v. Oelrichs*, 156 Cal. 782, it is necessary to an estoppel that there must be an irreparable change of position upon the part of plaintiff,

independent of mere part performance of the contract (pp. 793-4).

What acts of part performance of an oral contract are sufficient is specified by statute. Plaintiff does not claim sufficient part performance.

Paul v. Layne & Bowler Corp., 9 Cal. 2d 561, 565;

Kibbey v. Kenney (Ariz.), 218 Pac. 984-5 (decision by Justice Ross).

Under the decisions of this Court and the rule of the California cases there is no estoppel to take an oral contract out of the statute of frauds unless there has been conduct on the part of the opposite party amounting to a representation that he will not avail himself of the statute to escape his agreement.

E. K. Wood Lumber Co. v. Moore Mill & Lumber Co. (C. C. A. 9), 97 F. 2d 402, 409;

Georgia Peanut Co. v. Famo Products Co. (C. C. A. 9), 96 F. 2d 440, 441 (Justice Denman);

Cincinnati Distributing Co. v. Sherwood & Sherwood Co. (C. C. A. 9), 270 Fed. 82;

Albany Peanut Co. v. Euclid Candy Co., 30 Cal. App. 2d 35, 38-9;

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Starkey v. Galloway (Ind.), 84 N. E. 2d 731;

Federal Land Bank v. Matson (S. D.), 5 N. W. 2d 314, 315;

Ludlow Cooperative Elevator Co. v. Burkland (Ill.), 87 N. E. 2d 238, 240-241.

III.

The Findings Do Not Support the Judgment.

The Court finds a refusal by defendant to accept the cattle. [R. 15, 20.] The only relief to which plaintiff would be entitled is damages for such breach, but the Findings and Record are bare of any suggestion of the amount of damages.

The judgment is rather one of specific performance which the Court had no right to order.

Again the finding that an oral contract to purchase the cattle was made on September 8th [Finding V; R. 9] confirmed on September 10th [Finding VI; R. 9-10] is in direct and irreconcilable conflict with the findings of fact in Conclusions I and II, that the offer then made was a continuing offer which was accepted by shipment on September 29th. The findings do not support the conclusion of estoppel to assert the statute of frauds.

The conclusions drawn by the Court do not follow from the specific facts found and the findings made do not support the Court's actual judgment.

ARGUMENT.

I.

There Was No Proof of Any Oral Contract Between Plaintiff and Appellant.

A. The Evidence Was Insufficient to Show a Mutually Enforceable and Binding Contract, Even Aside From the Statute of Frauds.

At the conclusion of the evidence the Trial Court stated that because of the disputed facts with reference to the asserted oral contract,

“This is probably the *closest* case that I have had to decide since I have been on this bench.” [R. 123.]

At the hearing on the motion for nonsuit he said that from the standpoint of plaintiff’s strongest position,

“You have Mr. Miller making an offer. It is a *continuing offer* until it is revoked.”

He said the shipping of the cattle “would probably constitute an acceptance.” [R. 102-3.]

This same idea is reflected in the Conclusion of Law I that appellant orally offered to purchase certain cattle and Conclusion II that plaintiff accepted the offer by shipping the cattle on September 29th [R. 19], but this Conclusion is in conflict with the statement in Findings V and VI that an agreement was made for the purchase of the cattle on September 8, 1948, and confirmed on September 10th [R. 9-10].

With this patent conflict in the Findings, it is difficult to determine the actual basis of the Court’s decision, but under the cases and the state of the Record neither of the conflicting Findings can be sustained.

B. The Finding That There Was an Agreement on September 8 and September 10, 1948 [R. 9-10] Is Unsupported.

Mr. Miller denied that the discussions of this date covered anything other than general market conditions. [R. 81, 114.]

Mr. Wade, an officer of the plaintiff and who was the only other party to the conversations, stated as to the conversation of September 8th:

“Q. Will you kindly relate that conversation with Mr. Miller?

Mr. Shipman: If the conversation has to do with the making of an alleged contract, may it please the court, simply for the purpose of the record may I enter the objection that it is irrelevant, immaterial and incompetent as it appears from the statements made before your Honor that it is a transaction in excess of the statutory provisions.

Mr. Mahl: I assure your Honor that this conversation has to do with the contract.

The Court: Objection overruled.

The Witness: I told Mr. Miller that Mr. Swanson had phoned me from the ranch and wanted to know if he was still interested in the purchase of the cattle that we discussed bringing down to him in May, and he said he was, and I asked him what the market was in Los Angeles and he said, ‘I will pay you 46 cents per pound plus 2 cents for the offal, and grade from commercial up.’ ” [R. 25-26.]

With reference to the conversation on September 10th, the same witness stated:

“Q. Will you tell us what was said at that conversation? What was that conversation?

A. I told Mr. Miller that my associate, Mr. Jaffe, was going up to the ranch and that I wanted to call him and confirm the conversation I had had with him on September 8th, and I had made a memorandum pad of our conversation at that September 8th meeting, so I referred to that. So I said, 'Well, Adolph, let me understand you clearly. If we ship cattle to you here in Los Angeles you will pay us 46 cents plus 2 cents for the offal and this is a firm commitment?'

He said, 'Yes, I can use this type of cattle. I will take them.'

I said, 'Well, the reason I am calling you back is I want to be sure that I have this commitment before I authorize the shipment of this cattle to Los Angeles.'

And he said, 'That is all right, son. Send them on down.'

He said, 'How many will there be?'

I said, 'Approximately 250 are ready to go now in this particular shipment, about 10 cars.'

He said, 'Well, that will be fine. You tell Swanson to send them on down.' " [R. 27-28.]

It is significant that the foregoing conversation on its face does not support the agreement to deliver in *October*. It is an agreement for immediate delivery, if at all. Certainly there is no evidence of any agreement which either party could enforce four or five weeks later in a fluctuating market.

The testimony of plaintiff's witness, Mr. Swanson, as to the phone conversation of September 27th, was:

"Q. Now will you tell us what the conversation was between you and Mr. Miller, as nearly as you can recall, Mr. Swanson? A. It is rather hard to recall

the entire conversation, but I called Adolph and, if I recall the conversation, I tried to sell the cattle there in Williams Lake—

Q. We will get to that in a moment.

The Court: What did you say over the telephone?

Q. (By Mr. Mahl): We are confining ourselves to this conversation on the phone. A. Well, as I recall it, I asked about the market in Los Angeles and, if I recall my statement, I said to Adolph, 'Well, is it all right to ship the cattle to the Union Packing Company?' He said, 'Well, the market is awfully weak down here, but try to sell them there if you can. If not, ship them.' Or words to that effect. I don't recall." [R. 61.]

While Jaffe, an officer of plaintiff, was in the telephone booth during the conversation and "could perhaps hear part of it" [R. 74] and had testified that appellant's officer said something about having a "deal" [R. 49], Mr. Swanson testified:

"The Court: Are you talking about the phone conversation now?

The Witness: As I recall that conversation—this is my recollection—I asked him about the market and then I naturally supposed that this is a deal which Wade and he had made, and I asked him, 'Well,' I said, 'is it all right to ship the cattle down to you?' I believe that is the way I put it. I am not certain about just what the wording was.

The Court: What else did he say?

The Witness: And he said to me, 'He said the market is bad down here, try to sell them up there if you can.'

The Court: Do you remember him saying anything about he had a deal?

The Witness: No, we didn't discuss that on the telephone.

The Court: Did he say, 'Send them on'?

The Witness: As I recall, he said, 'If you can't sell them why send them on.'

Q. (By Mr. Shipman): Did he say that he would use them? A. Well, I just—

Q. Did he say that to you? A. No, I don't think so.

Q. You had no other discussion as to the price? A. No." [R. 75.]

It is admitted that plaintiff did proceed with its efforts to sell the cattle to buyers other than appellant, first, trying to sell the cattle at Williams Lake near plaintiff's ranch [R. 72, 111] and then in Vancouver, B. C., when the cattle were already in Vancouver [R. 73, 112].

It is also admitted that Swanson, after having shipped the cattle from British Columbia, sent a wire to appellant [Plaintiff's Exhibit 1] stating that the cattle were being shipped to him and that plaintiff's officer was flying down to Los Angeles to see appellant. When appellant's officer received this wire, he made an effort to locate Swanson at British Columbia [R. 83, 114, 116], and when Swanson arrived the next day, he was told by appellant that the cattle would not be accepted and that appellant had not agreed to buy them [R. 64-65, 70, 73, 76]. Arrangements were made, with the consent of Swanson, to divert the cattle to the Union Stockyards and have them sold through the Southwest Commission Company. [R. 68-69, 76, 77.]

Appellant's officer's testimony with respect to the diversion is in the Record at pages 87 and 110, and the testi-

mony of Mr. Hill of the Southwest Commission Company at pages 105, 113 and 117.

Plaintiff made no objection to the diversion of the cattle but cooperated with the Southwest Commission Company in the sale of the cattle and accepted from the Southwest Commission Company a check in the amount of approximately \$57,000.00.

The commission house was unable to obtain a bid higher than 21 cents, which was from the Cudahy Packing Company, and appellant, in order to help Swanson out, then made an offer of 21½ cents and purchased the cattle from the Southwest Commission Company. [R. 67, 69, 77, 86.]

The Trial Court, after stating that he was unable to resolve the conflicting testimony, referred to two matters which he considered significant as indicating reasons why appellant changed its mind about purchasing the cattle. The first [R. 124] was cancellation of a government contract for 200,000 pounds of meat (Canadian cattle were not applicable to supply a government contract). The second matter referred to by the Court [R. 125] is the drop in the price of cattle in early October.

In referring to these extraneous matters, the Court has violated the elemental rule that lack of evidence cannot be supplied by proof of motive.

As stated in *Percival v. National Drama Corporation*, 181 Cal. 631, 638:

“Proof of motive cannot take the place of substantive proof of the act which is to be accomplished.”

It is clear aside from the conflicting Findings and Conclusions of the Trial Court that the testimony of plaintiff does not support the finding of a definite certain contract.

There was no agreement which appellant at any time could have enforced against the plaintiff. Equally, there was no agreement which plaintiff could enforce against appellant.

The time of delivery of the cattle was not specified. In the conversations of September 8th and 10th Mr. Miller was said to have requested that the cattle be shipped immediately. This was not done. In the only other conversation, *i. e.*, September 27th, it is admitted that he suggested that efforts be made to sell the cattle in Canada and it is also admitted that such efforts were actually made.

Therefore, there was no binding contract on September 10th and no binding contract on September 27th, and none is found.

C. No Enforcible Contract Exists for the Reason That Its Terms Are so Indefinite and Uncertain That It Is Impossible to Ascertain What Promise Was Being Made and What Promise Was Being Accepted.

“ ‘A contract is an agreement to do or not to do a certain thing.’ (Sec. 1549, Civ. Code.) One of the essential elements of a contract is the consent of the parties. (Sec. 1550, Civ. Code.) This consent must be mutual. (Sec. 1565, Civ. Code.) ‘Consent is not mutual, unless the parties all *agree upon the same thing in the same sense.* . . .’ (Sec. 1580, Civ. Code.) (See, also, Restatement of the Law, Contracts, sec. 19.) As is said in 6 California Jurisprudence, page 41:

“ ‘Mutual consent is necessary to the existence of any contract. Assent of at least two minds to each

and all of the essentials of the agreement is required; and it is only upon evidence of such assent that the law enforces the terms of a contract or gives a remedy for a breach of it. One cannot be made to stand on a contract to which he never consented.' ”

McClintock v. Robinson, 18 Cal. App. 2d 577, 582.

12 *American Jurisprudence*, page 518, Section 21:

“Where Language is Ambiguous.—When the offerer, using ambiguous language, reasonably means one thing and the offeree reasonably understands differently, there is no contract. It has been stated that the parties in such a case have ‘said different things.’ Thus, where, after the parties have apparently agreed to the terms of a contract, circumstances disclose a latent ambiguity in the meaning of an essential word by which one of the parties meant one thing and the other a different thing, the difference going to the essence of the supposed contract, the result is that there is no contract. Where there is such a misunderstanding as to the terms of a contract, neither party is obligated in law or in equity. Furthermore, a defense may be asserted where there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus *ad idem*.”

As the Supreme Court has stated:

“Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or in equity. *Baldwin v. Middleberger*, 2 Hall (N. Y.)

176; *Coles v. Bowne*, 10 Paige (N. Y.) 526; *Utley v. Donaldson*, 94 U. S. 29.

“Where a contract is a unit, and left uncertain in one particular, *the whole will be regarded as only inchoate, because the parties have not been ad idem, and, therefore, neither is bound.* *Appleby v. Johnson*, Law Rep. 9 C. P. 158.” (Emphasis added.)

National Bank v. Hall, 101 U. S. 43, 44-5.

Quoted with approval:

Meux v. Hogue, 91 Cal. 442, 448.

See, also, to the same effect:

Breckenridge v. Crocker, 78 Cal. 529, 536-8;

Harvey v. Duffey, 99 Cal. 401, 405;

Gruesner v. Thatcher (Minn.), 197 N. W. 968, 969;

Sibley v. Felton (Mass.), 31 N. E. 10;

German Savings & Loan Soc. v. McLellan, 154 Cal. 710, 715-6;

Peerless Glass Co. v. Pacific Crockery and Tinware Co., 121 Cal. 641, 646-7;

Indiana Fuel Supply Co. v. Indianapolis Basket Co. (Ind. App.), 84 N. W. 776, 777;

Gordon v. Churchill (S. D.), 148 N. W. 848-850;

D. S. Cage & Co. v. Black (Ark.), 134 S. W. 942-945;

Georgia R. R. Co. v. Smith (Ga.), 10 S. E. 235-236.

Tested by the rule of the foregoing cases, it is clear that there is no binding oral contract in the present case.

In the present case the degree of proof required of a party asserting an oral contract is greater than that laid down in the cases mentioned above where there was no question of the statute of frauds. Where a party seeks to avoid the operation of the statute of frauds, the cases hold that his evidence of the oral agreement must be clear and convincing and not conflicting and unclear as the Trial Court declared plaintiff's evidence to be in this case. [R. 123.]

The cases hold that plaintiff's evidence of the oral agreement in order to avoid the bar of the statute of frauds must be "just as good as a writing of the agreement between the parties."

Hambey v. Wise, 181 Cal. 286, 289.

" . . . the agreement must appear to be certain in its terms, and just and fair in all its parts."

Blum v. Robertson, 24 Cal. 127, 143;

23 Cal. Jur. 466.

In the present case under no permissible view of the evidence can it be said that the contract is clear, certain, free from doubt and mutually binding, but whatever the decision of the Court on that point it is settled beyond controversy that the statute of frauds bars recovery under such an asserted contract.

II.

The Oral Contract Asserted Was Within the Statute of Frauds and There Was No Proof of Any Facts Which Would Take This Case Out of the Operation of the Statute.

The asserted contract is barred by the statute of frauds.
Civil Code, Sec. 1724.

The interpretation and application of Civil Code, Section 1724, which makes unenforceable an oral contract for the sale of personal property of the value of more than \$500.00, is a question arising under the Uniform Sales Act which was adopted in California in 1931 and involves a matter in which uniformity of interpretation is essential to the commercial life of the nation.

As the California courts have stated:

“It is very much more important to have uniform rules than inerrant logic . . . Uniform laws must necessarily fail of their purpose unless there is uniformity in their interpretation and application.”

Charles Nelson Co. v. Morton, 106 Cal. App. 144, 149.

“We think that principles of commercial law, long established and maintained by a consistent course of decisions in the other states, should not be disturbed. . . . We repeat, the stability and certainty of those rules are of more importance than any fancied benefits which might accrue from any innovation upon the system.”

Aud v. Magruder, 10 Cal. 282, 291-2;

Utah State National Bank v. Smith, 180 Cal. 1, 3, 4;

C. I. T. Corp. v. Panac, 25 Cal. 2d 547, 552.

It is obvious in the present case that the Trial Court was more actuated by zeal to give effect to his theory of promissory estoppel than by any consideration of the many authorities bearing on the case, including the decision of this Circuit which he expressly refused to follow. [R. 122.]

The Trial Court's holding was that if there was an oral agreement, then promissory estoppel applied. Its only question was: Is there an oral agreement? [R. 120.]

He specifically stated that the rule of this Court in *Wood v. Moore*, 97 F. 2d 420, that "to give rise to the estoppel there must have been conduct on the part of the opposite party amounting to a representation that he will not avail himself of the statute to escape his agreement" would *not* be followed by him, saying:

"With all due respect to my superior, Judge Stephens, *I do not think that that is the law*. I think that goes too far." [R. 122.]

In that case, the full title of which is *E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (C. C. A. 9), 97 F. 2d 402, 409, plaintiff sued for damages for breach of contract to purchase lumber. Judgment for defendant was affirmed, this Court saying:

"The defense of the statute of frauds having been raised by appellee's answer which denied the making of the contract, the burden was on appellant to prove that the contract sought to be enforced was in writing. *Walsh v. Standart*, 174 Cal. 807, 810, 164 P. 795; *Feeney v. Howard*, 79 Cal. 525, 21 P. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Videau v. Griffin*, 21 Cal. 389, 391; *Jamison v. Hyde*, 141 Cal. 109, 112, 74 P. 695." (P. 408.)

“Appellant argues that appellee is estopped to assert that the agent had no written authority. We see no reason for applying a different rule in respect to this contention than that applicable where estoppel is claimed with respect to the statute of frauds proper. In the latter case it is necessary to show not only a change of position to the injury of the party asserting the estoppel, but also that there has been conduct on the part of the opposite party amounting to a representation that he will not avail himself of the statute to escape his agreement. In *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154, the case most strongly relied upon by appellant, there was a definite promise to give a written contract, which promise was never performed. The court in holding that there was an estoppel to assert the statute quoted from 5 Brown on Statute of Frauds. §457a, as follows: ‘A plaintiff . . . must be able to show clearly . . . not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance. . . .’ (Page 795, 106 P. page 94.)” (P. 409.)

This decision written by Justice Stephens bears a close similarity to the decision of this Court (opinion by Justice Denman) in *Georgia Peanut Co. v. Famo Products Co.* (C. C. A. 9), 96 F. 2d 440, 441, where plaintiff sued for breach of a contract of sale of peanuts to defendant's predecessors, claiming the contract was made by a broker by virtue of a memorandum signed by the broker for both parties. Defendants denied the contract and denied the broker's authority. There was no written memorandum

signed by the principal. In affirming judgment for defendants, this Court said:

“Appellant attempted to establish that the buyer was estopped. The evidence offered in support of appellant’s burden of proof on this issue was that the buyer said and did nothing about the memorandum prior to the time the appellant bought certain peanuts to resell to the buyer. Since there is no binding contract, the buyer can be estopped to deny its validity only by some prejudice to the seller caused by some affirmative act on which the seller relied. We uphold the District Court’s finding that there was no such action on the part of the buyer.” (Pp. 441-2.)

In *Cincinnati Distributing Co. v. Sherwood & Sherwood Co.* (C. C. A. 9), 270 Fed. 82, plaintiff sued to recover damages for defendant’s breach of contract to sell it 198 barrels of whiskey at a certain price. The contract had been made with defendant’s agent who had sent plaintiff certain confirmatory telegrams. But the telegrams did not show any agency and there was no written authorization for the agent to represent defendants. Judgment for defendants was affirmed, this Court saying:

“It was shown that the plaintiff, immediately upon receiving notice of the purchase by Hellman, sold the merchandise to a customer at \$1.40 per gallon, and about two weeks after that time received notice that the defendant had repudiated the contract and sold the whisky to another. It was shown, also, that the plaintiff, being unable to deliver the merchandise it had sold, was obliged to buy other whisky at \$1.85 per gallon in order to fulfill its obligation, whereby it lost \$5,272.75. The plaintiff contends that the facts estop the defendant to avail itself of the statute of frauds; that one is not permitted to dispute a state of facts

which he has induced another to believe in and to act upon. It is true that a contract may be within the statute of frauds, yet if the conduct of the party who relies upon the statute has been such as to raise an equity outside of and independent of the contract, he may be estopped to make that defense. 20 Cyc. 308.

“In *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, the court held that to create estoppel against the defense of the statute there must be some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the other party, either express or implied. Here there were no acts of acquiescence on the part of the defendant. It received no consideration for the sale. It partes with the possession of none of the goods purchased. It was not advised that the goods were wanted for immediate resale, nor did it know before it repudiated the contract that the goods had been resold. There was nothing except its silence to indicate to the plaintiff that the oral contract would be performed. The mere fact that one acts upon an oral promise, hoping that it will be carried out, does not create estoppel. *Miller v. Hart*, 122 Ky. 494, 91 S. W. 698; *Regan v. Kirk*, 140 Iowa 302, 118 N. W. 317.” (Pp. 83-4.)

It is obvious that under the rule of these three decisions written by learned Justices of this Court, plaintiff has shown nothing to avoid the bar of the statute of frauds. It is equally obvious that the rule of these decisions is in no wise inconsistent with the rule of the California State Court decisions.

In *Seymour v. Oelrichs*, 156 Cal. 782, 793, it was the fact of defendant's promise to execute a written contract and the subsequent failure to do so that gave rise to the estoppel. (*Ruinello v. Murray*, 99 A. C. A. 20, 22, 221 P. 2d 184.)

Under the rule of *Seymour v. Oelrichs*, it is necessary to an estoppel that there must be an irreparable change of position upon the part of plaintiff, independent of mere part performance of the contract.

"The claim of plaintiff is not that mere part performance of a contract for personal services which by its terms is not to be performed within a year, 'invalid' under our statute because not evidenced by writing, renders the same valid and enforceable. Such a claim would, of course, find no support in the authorities. (5 Brown on Statute of Frauds, Sec. 558.) . . . under this claim the fact of part performance by plaintiff plays no part whatever."

Seymour v. Oelrichs, 156 Cal. 782, 793-4.

In *Paul v. Layne & Bowler Corp.* 9 Cal. 2d 561, 565, plaintiff sued for (1) damages for failure to execute a farm lease and for (2) amounts expended to improve the farm. Judgment for defendant was affirmed as to the first cause of action and reversed as to the second. The Court said:

"Nor may the plaintiff place reliance upon the equitable doctrine of estoppel recognized in *Seymour v. Oelrichs*, 156 Cal. 782 (106 Pac. 88, 134 Am. St. Rep. 154), and similar cases (see *Long v. Long*, 162 Cal. 427 (122 Pac. 1077); *Little v. Union Oil Co.*, 73 Cal. App. 612, 620 (238 Pac. 1066), to support his contention that he is entitled to damages for the breach

of the oral agreement to execute the lease, which, so he claims, was fully performed by him. It is apparently the plaintiff's theory that the performance alleged is the consideration for the promise to make the lease, and that having performed on his part he is entitled to damages for the failure of the defendant to perform. But the passing of the consideration as performance on his part of the oral contract is not alone sufficient to entitle him to any relief for the breach thereof. His remedy is in a cause of action for the return of the benefits received by the defendant. (*Forrester v. Flores*, 64 Cal. 24 (38 Pac. 107); *Davis v. Judson*, 159 Cal. 121 (113 Pac. 147); *Matheron v. Ramina Corp.*, 49 Cal. App. 690, 694 (194 Pac. 86); *Dondero v. Aparicio*, 63 Cal. App. 373 (218 Pac. 608).) The facts alleged and stated show that the plaintiff could not present a case of fraud or unconscionable injury to support an estoppel under any statute or authority relied upon by him.

"The intimation in the case of *Martinez v. Yancy*, 40 Cal. App. 503 (180 Pac. 945), relied on by the plaintiff, that there may be a remedy by an action for damages for the breach of an oral promise to make a lease for a longer period than one year, is inconsistent with the generally accepted doctrine that no right of action for damages exists for the breach of an invalid or unenforceable contract (*Kiser v. Richardson*, 91 Kan. 812 (139 Pac. 373), and cases cited in note, Ann. Cas. 1915D, p. 540 *et seq.*), even though the plaintiff has partly or wholly performed on his part (*White v. McKnight*, 146 S. C. 59 (143 S. E. 552), and cases cited in note, 59 A. L. R. 1305 *et seq.*), and should be disregarded.

"Under any view of the case, the most to which the plaintiff would be entitled is the amount he had

expended for the defendant's account for which he has not been reimbursed, and a return of or compensation for the benefits which the defendant has received under the plaintiff's occupancy by which the defendant has become unjustly enriched and for which it is therefore indebted to the plaintiff." (Pp. 565-6.)

In *Albany Peanut Co. v. Euclid Candy Co.*, 30 Cal. App. 2d 35, 38-9, plaintiff sued for damages for breach of an oral contract to buy peanuts. Plaintiff alleged it held the peanuts for defendant from June 3rd to September 19th, that defendant promised to put the contract in writing but finally returned it unsigned, and that plaintiff had suffered substantial damages by reason of holding the peanuts. Judgment for plaintiff was reversed, the Court saying at pages 38-39:

"Before such an estoppel can arise the essential terms of the contract must be shown with reasonable certainty, and that representations were made by the opposite party that the invalidity of the contract under the statute would not be asserted, together with the fact that the party urging the estoppel has, pursuant to the terms of the contract, and induced by the representations and in reliance thereupon, changed his position to his detriment, the intention to make such change being known at the time to the one making the representations. The circumstances must clearly indicate that it would be a fraud for the party offering the inducements to assert the invalidity of the contract under the statute, and unless the words and conduct of the party sought to be held amount to an

inducement to the other to waive a written contract in reliance upon the representation that the person promising will not avail himself of the statute of frauds there is an absence of fraud which is requisite to an estoppel. (*Little v. Union Oil Co.*, 73 Cal. App. 612 (238 Pac. 1066); *Long v. Long*, 162 Cal. 427 (122 Pac. 1077); *Seymour v. Oelrichs*, 156 Cal. 782 (106 Pac. 88, 134 Am. St. Rep. 154); *Zellner v. Wassman*, 184 Cal. 80 (193 Pac. 84); *Standing v. Morosco*, 43 Cal. App. 244 (184 Pac. 954).)

“A mere promise to execute a written contract, followed by refusal to do so, is not sufficient to create an estoppel, even though reliance is placed on such promise and damage is occasioned by such refusal. The acts and conduct of the promisor must so clearly indicate that he does not intend to avail himself of the statute that to permit him to do so would be to work a fraud upon the other party. (*Little v. Union Oil Co.*, *supra.*)” (Pp. 38-9.)

The foregoing statement of the rule was quoted and applied in *Kroger v. Bauer*, 46 Cal. App. 2d 801, 804.

What acts of part performance of an oral contract are sufficient is specified by statute.

In *Kibbey v. Kinney* (Ariz.), 218 Pac. 984-5, decision by Justice Ross, it was stated:

“But the statute provides just what acts or things will take a parol contract out of the statute, and what plaintiff claims he did is not one of them.” (The

decision then sets forth the rule of 27 C. J. 346, Sec. 428.)

“Accordingly the doctrine of part performance has no application to the sale of goods.”

In *Starkey v. Galloway* (Ind.), 84 N. E. 2d 731, after orally selling 45 steers to plaintiff, defendant resold in Chicago for a higher price. Plaintiff sued for conversion. Judgment for defendant was affirmed, the Court saying:

“ . . . one who seeks to assert an equitable estoppel must affirmatively show that he has relied upon the conduct of the other party and has acted upon it in such a manner as to change his position for the worse; that the other party’s refusal to carry out the terms of the agreement has resulted not merely in a denial of the rights which the agreement was to confer, but the infliction of an unjust and unconscionable injury and loss. 49 Am. Jur., p. 890, Sec. 583”

Federal Land Bank v. Matson (S. D.), 5 N. W. 2d 314, 315;

Ludlow Coop. Elevator Co. v. Burkland (Ill.), 87 N. E. 2d 238, 240-41.

A state court decision is not binding, except as to that portion of the decision necessary to determination of rights of parties. *Dicta* or other chance expressions are to be disregarded.

New England Mut. Life Ins. Co. v. Mitchell (C. C. A. 4), 118 F. 2d 414, 419, 420; cert. denied 86 L. Ed. 505.

In *Booth v. A. Levy & J. Zentner Co.*, 21 Cal. App. 427, 431, it was held, reversing a judgment for plaintiff, that payment of freight charges by seller and resale at a loss is insufficient to take an oral contract out of the statute, the Court saying:

“We see nothing in the record to support the contention that defendant is estopped to rely upon the statute of frauds. It is a plain case where the seller chose to ship goods to a distant buyer who was bound by an oral agreement only. To hold that under such circumstances the buyer who refuses to accept the goods is estopped to rely upon the statute would be to practically abrogate the statute of frauds. (*Hicks v. Post*, 154 Cal. 22 (96 Pac. 878).)” (P. 431.)

Here the freight and custom duty paid were necessary to be paid on shipment to any large American market. There is no finding whatsoever, and there can be no presumption, that plaintiff was damaged by the amount of these payments, or any other amount.

That plaintiff suffered any damage by payment of freight and customs is wholly conjectural. Plaintiff had tried to sell the cattle in Canada unsuccessfully. Plaintiff's officer testified that its natural markets with the lifting of the embargo were in the United States, mentioning markets all over the country. [R. 35.]

While there was some evidence of a decline in cattle prices in Los Angeles, it cannot be presumed that this decline was purely local, but, on the other hand, it must be

presumed to be national, and, being national, it would have also affected the Canadian markets.

To make the sale to any American market, plaintiff would have had to incur the expense which it did incur. In making this expense it did not suffer an irreparable hardship. It was a natural and necessary expense of marketing the cattle and just as much a part of normal expense as feeding the cattle.

Even in the case of *Seymour v. Oelrichs*, 156 Cal. 782, as pointed out above, it is held that part performance of a contract itself is not a hardship within the meaning of the rule of promissory estoppel. Certainly there was no damage suffered by plaintiff under the rule of the *Seymour v. Oelrichs* case, or of the *Booth v. A. Levy & J. Zentner* case, or *Standing v. Morosco*, 43 Cal. App. 244, where the decision of the Trial Court was by Justice Wilbur and the decision on appeal by Justice James.

To ignore the defense of the statute of frauds in this case as the Trial Court has done is to render the act entirely nugatory. All that a seller has to do to avoid the statute is to ship goods to a purchaser and then "outswear" him at the trial, the very situation which the act was intended to preclude.

The Record, therefore, shows none of the elements essential to be shown to avoid the statute, but, on the contrary, shows affirmatively that no judicial consideration was given to these issues.

III.

The Findings Do Not Support the Judgment.

While the Trial Court in five separate Findings declares there was a "refusal" by appellant "to accept" the cattle [Finding XVII, R. 13-14; Finding XVIII, R. 14; Finding XXIV, R. 17; Finding XXV, R. 17; Conclusion III, R. 20], the relief ordered by the Court is not damages for such breach, but specific performance [R. 17-18].

The judgment [R. 21] and the Findings [R. 17] are merely a decision that plaintiff is entitled to recover the full amount of money to which it would have been entitled under the asserted contract, *i. e.*, a judgment of specific performance. There is no finding anywhere that plaintiff was damaged in any sum of money or that plaintiff is entitled to recover any sum as damages, nor was there any evidence to support any such finding.

If plaintiff were entitled to damages, it would be the difference between the market value and the contract value at the date of appellant's refusal to accept delivery which is found to be October 6, 1948 [R. 14], but there was no evidence at the trial and no finding as to the difference between the contract and market price at that date, which alone would measure plaintiff's damages.

Civil Code, Sec. 1784.

There is nothing to show that the cattle had any special or unique value either in the Findings or the Record.

Even the findings as to the existence of the asserted oral contract are irreconcilable. It is first declared that the phone conversation of September 8th created an oral contract [Finding V; R. 9] and then that the phone conversation of September 10th confirmed this oral contract

[Finding VI; R. 9-10]. But the Trial Court concludes in an entirely different vein Conclusion I [R. 19] that appellant on September 8, 1948, and again on September 10th, did "orally offer to purchase" the cattle and by Conclusion II [R. 20] "Plaintiff accepted the said offer . . . by shipping 248 head of cattle from British Columbia, Canada, on September 29th, 1948, consigned to defendant at Los Angeles, California."

The same holding of a continuing offer instead of a contract was announced by the Trial Court at the conclusion of the trial. [R. 123.] It had previously been stated by the Court at R. 102.

Certainly an oral contract of such nebulous and indefinite character is insufficient to avoid the bar of the statute of frauds.

In an attempt to avoid the bar of the statute, the Trial Court found that plaintiff had expended certain sums for freight and duty [Finding XV; R. 13], but there is no finding that plaintiff suffered damage in this or any other amount. In fact, the presumption is to the contrary. On any shipment to the United States these charges would have had to be paid by plaintiff. The ultimate receipts presumably were increased by expenditures in sending the cattle to any large market.

It follows that there is no basis for the theory of promissory estoppel espoused by the Trial Court in defiance of the decisions of this Court and no support for his Conclusion III [R. 19-20] in that regard.

The Trial Court was required to make findings of fact on all material issues necessary to support the judgment. (Rule 52.)

In *Sims v. Green* (C. C. A. 3), 161 F. 2d 87, 89, judgment for plaintiff was reversed, the Court saying:

“The findings of fact are insufficient. Finding 17 will not sustain the preliminary injunction and Sims can point to no stronger finding.”

In *Schilling v. Schwitzer-Cummins Co.* (C. C. A., D. C.), 142 F. 2d 82, 84, the Court said:

“The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence.”

Under the new rules the inferences or conclusions drawn by the Trial Court from its findings of fact operate without benefit of presumption.

In *Kuhn v. Princess Lida* (C. C. A. 3), 119 F. 2d 704, 705-6, the Court said after referring to the Rule 52 and the extent to which findings of fact are binding on appeal:

“The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, the appellate court remains free to draw the ultimate inferences and conclusions which in its opinion, the findings reasonably induce.”

In *Gates v. General Casualty Co.* (C. C. A. 9), 120 F. 2d 925, 929, this Court said that the power of review under Rule 52a is broader than the power possessed by the California Appellate Courts.

From a consideration of the findings, conclusions and opinion of the Trial Court itself, it is obvious that a fair

trial was not afforded and that the Trial Court, in effect, endeavored to make a contract between the parties which the parties themselves had never entered into. This the Court did after it had realized that there was no contract between the parties.

Conclusion.

The decision of the Trial Court, in addition to being in wilful defiance of the decisions of this Court, as the Trial Judge himself stated, departs from the principle that the agreement must be certain in all of its terms and just and fair in all of its parts, in order to avoid the bar of the statute of frauds. The purported agreement here is but a roving commission for the plaintiff to obtain all he can wherever he can, and, in the event he couldn't get any more, then and only then he could dump the burden upon the shoulders of the defendant. Such is not our concept of any principle that would give the right to invoke what would in effect amount to equitable relief.

To sustain the present decision will be to annul the statute of frauds. The issues here presented are of vital concern to every business enterprise.

It is respectfully submitted that for each of the reasons herein advanced the judgment of the Trial Court should be reversed.

Respectfully submitted,

BENJAMIN W. SHIPMAN,

Attorney for Appellant.

No. 12703.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACKING COMPANY,

Appellant and Defendant,

vs.

CARIBOO LAND & CATTLE CO., LTD.,

Appellee and Plaintiff.

BRIEF OF APPELLEE CARIBOO LAND &
CATTLE CO., LTD.

FREDERICK W. MAHL, JR.,
610 Rowan Building, Los Angeles 13.
Attorney for Plaintiff and Appellee.



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UNION PACKING COMPANY,

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CARIBOO LAND & CATTLE CO., LTD.,

Appellee and Plaintiff.

BRIEF OF APPELLEE CARIBOO LAND & CATTLE CO., LTD.

Statement of Facts.

Plaintiff, Appellee, is an American owned and officered corporation operating extensive cattle ranches in West Central British Columbia, Canada. Defendant, Appellant, is a California corporation engaged at Los Angeles, California, in the slaughtering and meat-packing business.

In May or June, 1948, a preliminary meeting was had between plaintiff's President, Mr. John Wade, and defendant's President and General Manager, Mr. Adolph Miller, at which the possibilities of the latter's Company purchasing cattle from plaintiff were explored. Mr. Miller stated that defendant would be interested in purchasing plaintiff's cattle and the matter was left for further discussion.

On September 8, 1948, they again conferred and Mr. Miller offered to purchase approximately 250 head of plaintiff's cattle, delivered to his company at Los Angeles, and offered pay therefor 46¢ per lb. of beef dressed there-

from, plus 2¢ a lb. for the cattle's offal. Thereafter, on September 10, 1948, Mr. Wade advised Mr. Miller that he wished to confirm Mr. Miller's offer of September 8th, as he desired to make arrangements for the shipment. Whereupon, Mr. Miller restated the terms of his previous offer.

Mr. Wade then communicated with the ranch and the cattle were brought to the railroad shipping point at Williams Lake, British Columbia. On arrival on a date placed between September 24 and September 28, 1948, Mr. Ray Swanson, then an officer of plaintiff corporation, telephoned from Williams Lake to Mr. Miller in Los Angeles, concerning the shipment, and Mr. Miller instructed Mr. Swanson to ship the cattle to defendant at Los Angeles, stating he had a deal concerning approximately 250 head. As Mr. Swanson was somewhat hard of hearing, Mr. Ben Jaffe, Vice President of plaintiff corporation, entered the phone booth with Mr. Swanson and overheard the conversation.

Following this conversation between Messrs. Swanson and Miller, and on the evening of the day thereof, plaintiff loaded the cattle at Williams Lake upon railroad cars and the shipment to defendant at Los Angeles, via Vancouver, British Columbia, was commenced.

The cattle were unloaded at Vancouver for water and feed and when ready to be reloaded, Mr. Swanson on September 28th, telegraphed Mr. Miller that ten carloads of cattle were leaving Vancouver. The cattle were thereupon shipped from Vancouver, consigned to defendant at

Los Angeles and arrived in Los Angeles on October 6, 1948.

It is uncontradicted that when the offer was made and reaffirmed that defendant had a contract to supply the United States Government with 200,000 pounds of dressed beef and that the Government cancelled this contract thereafter and while the cattle were in transit. It is also uncontradicted that the market price of dressed beef dropped appreciably from the period of September 8 and September 10, and the time the cattle arrived in Los Angeles.

Following the transmission of the said telegram of September 28 to Mr. Miller, Mr. Swanson came to Los Angeles and saw Mr. Miller a few days before the arrival of the cattle. At that time, Mr. Miller on behalf of defendant buyer, disavowed any arrangements with plaintiff and arranged with the Southern Pacific Company as carrier to divert the cattle from defendant's yards, as consigned, to Union Stockyards at Los Angeles (the Union Stockyards have no connection with the Union Packing Co.), and arranged for the cattle to be offered on the open market to cattle purchasers. The highest offer made for the cattle was 21¢ a pound live weight. Defendant then took the cattle, paying 21½¢ per pound live weight therefor. This sum amounted to \$1348.10 over the price otherwise offered.

The Regulations of the United States Department of Agriculture required, inasmuch as these cattle were coming from a foreign country, that they be slaughtered within 14 days after entering this country. The cattle

entered the United States on September 29th, and arrived in Los Angeles on October 6th, and were unloaded October 7th. Accordingly, there were only a very few days within which the cattle had to be slaughtered under the risk of the penalties imposed by the Regulations.

The present action is for the difference between the contract price of the cattle and the sum which plaintiff received on account. The court below gave plaintiff judgment for that sum and defendant appeals.

The defense urged at the trial and again upon this appeal is (1) that there was no agreement between plaintiff and defendant and (2) that if there was such an agreement, it being admittedly oral, it is invalid under the Statute of Frauds in the State of California. The trial court concluded from the evidence that there was an agreement between the parties inasmuch as the defendant had made a continuing offer to purchase approximately 250 head of cattle delivered in Los Angeles for a stated price and that the plaintiff had accepted such offer by delivering 248 head. The court further concluded that the words and conduct of the President and General Manager of defendant corporation following the offer, were such as to estop the defendant from asserting the Statute of Frauds as a defense to the action.

The basis upon which the trial court had jurisdiction is, as alleged in paragraphs I and II of the Complaint [Tr. 2], diversity of citizenship and that the amount in controversy exceeds the sum of \$3,000 (28 U. S. C. A. Sec. 1332, A-1).

BRIEF OF THE ARGUMENT.

I.

**Findings of Fact Will Not Be Disturbed on Appeal
if There Is Sufficient Evidence to Support Them.**

In considering the case on appeal, this court must accept the evidence supporting the judgment if substantial and will not disturb the Findings of Fact if supported by sufficient evidence.

II.

**The Evidence Establishes That a Valid and Binding
Contract for the Sale and Purchase of the Cattle
Was Entered Into Between the Parties.**

A. Defendant's offer was preceded by a preliminary conversation regarding its purchase of cattle.

B. Defendants made a continuing offer to purchase approximately 250 head of cattle upon specific terms.

C. Thereafter, defendant's President reaffirmed such offer.

D. Plaintiff accepted defendant's offer by shipping to it at Los Angeles 248 head of cattle.

E. The inactivity of defendant's President, upon receiving a telegram advising him that the cattle were being sent, is evidence of the agreement.

F. Under the established custom of the business, the consigning of the cattle by the plaintiff to the defendant is evidence of the agreement.

G. The actions of defendant's President upon the arrival of the cattle in Los Angeles in causing them to be diverted from defendant's yards, in arranging for them to be sold by a commission merchant, and in paying considerably more than the highest bid, is evidence of the existence of the agreement between the parties.

H. The defendant's records of the slaughter of these cattle in revealing that such records were kept in a different manner than were its records generally, is evidence of the agreement.

I. There were no actions of the plaintiff at any time which were inconsistent with the existence of an agreement.

III.

The Terms of the Agreement Were Definite and Certain and Were Fully Performed by Plaintiff.

A. The agreement was definite and certain as to subject matter, covering as it did approximately 250 head of killable fat cattle. Plaintiff delivered 248 head of killable fat cattle to defendant.

B. The price to be paid for the cattle was definite and certain and was a minimum of 46 cents per pound of beef dressed therefrom, plus 2 cents per pound for the offal yielded therefrom.

C. The time for the delivery of the cattle in Los Angeles was agreed to as being prior to October 10, 1948. The plaintiff delivered the cattle at Los Angeles on October 6, 1948.

IV.

Defendant Repudiated the Contract Because of the Admitted Drop in the Market for Dressed Beef and Because of the Cancellation by the Government of Substantial Contracts for the Purchase of Dressed Beef.

A. It is undisputed that the market price of dressed beef dropped between the time defendant made the offer, and subsequently confirmed it, and the time the cattle arrived in Los Angeles.

B. It is undisputed that between the time plaintiff made the offer and subsequently confirmed it and the time when the cattle arrived in Los Angeles, the United States Government cancelled its contracts with the defendant to purchase dressed beef in the approximate quantity of beef dressed from the cattle in question.

V.

Defendant, by the Words and Conduct of Its President and General Manager, Is Estopped to Assert the Statute of Frauds.

Under the decisions of this court, the trial court is given discretion in determining the application of the doctrine of equitable estoppel and this court will not interfere with such findings in the absence of an abuse of discretion.

A. Subsequent to defendant making the offer to purchase, and prior to plaintiff shipping the cattle, defendant acknowledged the agreement and directed plaintiff to ship the cattle and is thereby estopped to assert the Statute of Frauds.

B. Defendant having induced plaintiff to expend in excess of \$10,000 for transportation and United States

Custom duties in the performance of the agreement, is estopped to assert the Statute of Frauds.

C. Defendant, not having withdrawn his offer when he received a telegram before the shipment was made advising him that the shipment was being made, is estopped to assert the Statute of Frauds.

D. Defendant induced plaintiff to ship the cattle into the United States knowing that it was required under the regulations of the United States Department of Agriculture to slaughter them within four days after they were unloaded and thus having deprived plaintiff of a suitable market for its cattle, is estopped to assert the Statute of Frauds.

E. The cases of this Court cited by defendant all recognize the doctrine of equitable estoppel.

VI.

The Findings of Fact Support the Judgment.

The Findings of Fact that defendant made and later confirmed a continuing offer to purchase cattle from plaintiff to be delivered to defendant at its meat packing plant in Los Angeles, that this offer was accepted by plaintiff by so delivering the cattle, and that the words and conduct of defendant's principal officer estop defendant from asserting the Statute of Frauds support the judgment.

The judgment as to the amount of recovery is supported by the Findings of Fact and the Court properly applied the law as to the amount of recovery.

ARGUMENT.

I.

Findings of Fact Will Not Be Disturbed on Appeal When There Is Sufficient Evidence to Support Them.

The basis of this appeal as seen from Appellant's Opening Brief is that the evidence is insufficient to support the Findings of Fact that the parties entered into an oral agreement and that defendant is equitably estopped by the words and conduct of its principal officer from asserting the Statute of Frauds. No rule of Federal appeals is more firmly established than that Findings will not be disturbed if supported by sufficient evidence. The Appellate Court limits its inquiry to whether or not there is substantial evidence in the record to support the Findings of the trial court. This court has time and again stated that it will not retry the case on appeal but will limit itself to the question of whether there is substantial evidence supporting the trial court's Findings of Fact. Among such cases of this Court are the following:

Ruud v. American Packing and Provision Co.,
C. A. Idaho (1949) 177 F. 2d 238;

Fox v. Summit King Mines, C. C. A. Nev. (1944)
143 F. 2d 926;

Kaname Fujino v. Clark, C. A. Hawaii (1949) 172
F. 2d 384, certiorari denied 69 S. Ct. 1512, 337
U. S. 937, 93 L. Ed. 1743;

Ford v. United Fruit Co., C. A. Cal. (1948) 171
F. 2d 641.

The rule is given expression in Rule 52a of the Federal Rules of Civil Procedure (28 U. S. C. A., Rule 52). (See additional cases collected under Note 46 (thereof).)

Accordingly, the question upon this appeal is whether there is sufficient evidence to support the trial court's Findings that an oral contract was entered into by the parties and whether there is sufficient evidence that the words and conduct of defendant's principal officer were such as to create an equitable estoppel to assert the Statute of Frauds.

II.

The Evidence Establishes That a Valid and Binding Contract for the Sale and Purchase of Cattle Was Entered Into Between the Parties.

A. The Preliminary Conversation Between Mr. John Wade, President of Plaintiff Corporation, and Mr. Adolph Miller, President of Defendant Corporation.

In May or June, 1948 [Tr. 25], Mr. Wade, President of plaintiff, and Mr. Miller, President and General Manager of defendant, met in Los Angeles, at which time Mr. Wade advised Mr. Miller of the type of cattle his company was breeding, and that he believed that he would have approximately 1,000 head ready to market in August or September. They discussed the feasibility of shipping cattle from plaintiff's ranches in the interior of Canada to defendant's packing house in Los Angeles. Mr. Miller stated that he would be interested in purchasing plaintiff's type of cattle. The matter was left that Mr. Wade would get in touch with Mr. Miller when, in August or September, the cattle would be ready for market [Tr. 25, 34].

Accordingly, the evidence supports Finding IV [Tr. 9].

B. The Defendants Made an Offer to Purchase.

1. THE DISCUSSION BETWEEN MR. WADE AND MR. MILLER ON SEPTEMBER 8, 1948.

On September 8, 1948, Mr. Wade and Mr. Miller had a conference in Los Angeles. Mr. Wade told Mr. Miller that plaintiff had approximately 250 head of cattle ready for shipment [Tr. 37] and inquired if Mr. Miller was still interested in purchasing Canadian cattle [Tr. 26]. Mr. Miller replied that he was, and in answer to Mr. Wade's inquiry as to price, Mr. Miller said: "I will pay you 46¢ per pound, plus 2¢ for the offal, and grade from commercial up" [Tr. 26], which, in the nomenclature of the business, means 46¢ for each pound of beef dressed from said cattle and that no cattle would be graded below commercial grade [Tr. 26 and 27]. In the cattle breeding and meat packing businesses weight of offal means the difference between the weight of the dressed beef and the gross weight—offal being liver, heart, brains, sweetbreads, hides, intestines, etc. [Tr. 44].

2. THE DISCUSSION BETWEEN MR. WADE AND MR. MILLER ON SEPTEMBER 10, 1948.

On September 10, 1948, Mr. Wade contacted Mr. Miller and said to him: "Well, Adolph, let me understand you clearly. If we ship cattle to you here in Los Angeles you will pay us 46 cents, plus two cents for the offal, and this is a firm commitment," to which Mr. Miller replied: "Yes, I can use this type of cattle. *I will take them.*" Mr. Wade then said: "Well, the reason I am calling you back is I want to be sure that I have this commitment before I authorize the shipment of this cattle to Los Angeles," and Mr. Miller replied: "That is all right, son. *Send them on down,*" and then inquired how many there would be and

Mr. Wade replied: "Approximately 250 are ready to go now in this particular shipment, about 10 cars." Mr. Miller replied: "Well, that will be fine. You tell Swanson to send them on down." During this conversation Mr. Miller inquired when the cattle would be shipped and Mr. Wade answered, "We will ship before October first" [Tr. 45]. In this conversation, as well as the conversation of September 8, Mr. Miller stated that he wanted the cattle shipped to the Union Packing Co., at Los Angeles [Tr. 42], and it was understood that the cattle would be shipped by rail and would be killable fat cattle and not feeder cattle [Tr. 41].

That the trial court was amply justified in accepting plaintiff's evidence regarding the foregoing conversations, as well as the conversation of September 24-28, 1948, between Mr. Miller and Mr. Swanson, hereinafter referred to, is abundantly shown from the following questions of the Court to Mr. Miller and Mr. Miller's replies:

"The Court: Are you active? Are you one of those executives that spend your time playing gin rummy or golf, or do you work at your job?"

The Witness: It all depends. Sometimes I am active.

* * * * *

The Court: What I am getting at, *do you have so many of these conversations about cattle that it is hard for you to remember a particular conversation about this particular lot?*

The Witness: *Yes, sir, I do.* I have various conversations with different people in different parts of the country." [Tr. 118].

Accordingly, Finding VI [Tr. 9] is abundantly supported by the evidence.

C. Thereafter, Between September 24 and 28, 1948, Defendant's President Reaffirmed the Offer.

Following his conversations with Mr. Miller on September 8 and September 10, Mr. Wade communicated the substance thereof to Mr. Jaffe [Tr. 47] and Mr. Swanson, who was at the ranch [Tr. 60], and 250 head of cattle were brought from the ranch to the railroad loading point at Williams Lake, British Colombia. *Mr. Miller admits that between September 24 and September 28, he talked with Mr. Swanson by telephone [Tr. 114] and that the subject of conversation was the sending of the cattle to the Union Packing Co. at Los Angeles [Tr. 115].* Mr. Wade and Mr. Swanson testified that Mr. Swanson telephoned from Williams Lake to Mr. Miller in Los Angeles and that due to Mr. Swanson being somewhat hard of hearing, he held the telephone receiver away from his ear so that Mr. Jaffe could, and did, hear both ends of the conversation [Tr. 48]. Mr. Swanson advised Mr. Miller that he was shipping "his" cattle to him, and inquired how Mr. Miller wanted them consigned, and Mr. Miller instructed Mr. Swanson to send them down consigned to the Union Packing Co. *as he had a "deal" [Tr. 49]. Mr. Miller admits in answer to a question by the Court, that he did in this conversation instruct Mr. Swanson to send him the cattle [Tr. 117].*

Finding VIII [Tr. 10] is accordingly amply supported by the evidence.

D. Plaintiff Accepted Defendant's Offer.

It is undisputed that plaintiff shipped, consigned to defendant at Los Angeles, 10 carloads of cattle consisting of 248 head and that the cattle arrived in Los Angeles October 6, 1948, where they were unloaded the following

day. This shipment was made while the offer remained open and was commenced the evening of the day that Mr. Miller instructed Mr. Swanson to ship them to him stating he had an agreement respecting them. The delivery of these cattle in Los Angeles consigned to defendant constituted an acceptance of the offer and as a result a contract was created between the parties.

E. Additional Evidence of the Contract Between the Parties.

The night of the day upon which the last mentioned telephone conversation between Mr. Swanson and Mr. Miller occurred, Mr. Swanson had 248 head of cattle loaded at Williams Lake and the shipment was started to defendant in Los Angeles [Tr. 61].

Finding IX is accordingly supported by the evidence.

The cattle were unloaded at Vancouver for water and feed and while they were there Mr. Swanson, on September 28, 1948, telegraphed Mr. Miller: "TEN CARS LEAVING NOON TODAY FLYING DOWN SEE YOU TOMORROW" [Pltf. Ex. 1; Tr. 61]. The purpose of this wire was that Mr. Miller could accommodate the cattle upon arrival [Tr. 29]. Mr. Miller admits receiving this telegram [Tr. 83]. The foregoing evidence supports Finding X [Tr. 11].

1. THE INACTION OF MR. MILLER ON RECEIPT OF THE TELEGRAM ADVISING THAT THE CATTLE WERE LEAVING, IS EVIDENCE OF THE EXISTENCE OF A CONTRACT BETWEEN THE PARTIES.

Mr. Miller testified that upon receipt of the telegram telling him that the cattle were leaving, he unsuccessfully attempted to reach Mr. Swanson by telephone at the Vancouver stockyards [Tr. 83]; but that *his only purpose of*

trying to reach Mr. Swanson was to advise him the conditions of the Los Angeles market [Tr. 114], and although when he got the wire “. . . I figured he probably was shipping them to me.” [Tr. 117.]

As Mr. Miller's company only buys cattle for the purpose of slaughtering and packing and not for resale or as a broker [Tr. 79], his admission that he believed the cattle were coming to him is clear evidence that he believed there was an agreement respecting the purchase of the cattle. Otherwise, Mr. Miller would have made efforts to contact Mr. Swanson at one of the hotels in Vancouver, or some official of defendant at the ranch, or attempted to locate Mr. Swanson through his home in the Los Angeles area the location of which he must have known having known Swanson for twenty years [Tr. 79]. None of these efforts were made by Mr. Miller [Tr. 83]. All that he did was to perfunctorily try to reach Swanson by telephone at the Vancouver stockyards and was, of course, unsuccessful.

2. THE CONSIGNING OF THE CATTLE BY PLAINTIFF TO DEFENDANT IS, IN VIEW OF THE ESTABLISHED CUSTOM OF THE BUSINESS, EVIDENCE OF THE EXISTENCE OF AN AGREEMENT.

The evidence is undisputed that by custom in the business cattle are consigned to the buyer only when an agreement for their purchase exists, and that if the shipper sends cattle intending to sell them on the open market, he consigns them to himself at their destination [Tr. 32]. The evidence is also undisputed that these cattle were consigned to the defendant in Los Angeles, not to the plaintiff [Tr. 84].

3. THE ACTIONS OF MR. MILLER UPON THE ARRIVAL OF THE CATTLE IN LOS ANGELES IS STRONG EVIDENCE OF THE EXISTENCE OF AN AGREEMENT.

When Mr. Swanson first saw Mr. Miller after his arrival in Los Angeles, and while the cattle were in transit, Mr. Miller repudiated his agreement but, nevertheless, at that time he (1) admits that he diverted the cattle to the Union Stockyards [Tr. 84], which was not requested by Mr. Swanson [Tr. 76]; and (2) arranged that Mr. Hill, of the Southwest Commission Company, procure bids for the cattle [Tr. 66]. The terms under which this commission house was to handle the cattle were not discussed with Mr. Swanson [Tr. 77]. When Mr. Hill advised Mr. Miller that the highest bid from any of the packers was that of the Cudahy Company of 21¢ per lb. live weight, Mr. Miller, on behalf of defendant, then paid the commission house 21-½¢ per lb. live weight, had the cattle delivered to his packing house and slaughtered [Tr. 67, 69, 86]. *The fact that defendant thus paid for these cattle \$1,348.10 more than the highest bid of all other packers is strongly persuasive that Mr. Miller knew that he had an agreement for their purchase and was thereby merely endeavoring to make his breach of the agreement less flagrant.*

It is no answer to the fact that Mr. Miller paid \$1,348.-10 more than the market for these cattle to say, as defendant does, that it was out of friendship for Mr. Swanson. Mr. Miller's deal for the cattle was set between himself and Mr. Wade, and Mr. Miller knew that he was dealing with a corporation and he did not know what interest, if any, Mr. Swanson had in the seller corporation [Tr. 87].

The trial court, believing Mr. Miller's conduct upon the arrival of the cattle to be only explainable upon the basis that Mr. Miller knew that he had an agreement for their purchase, observed:

"Had these men just shipped cattle to him without any understanding on his part that they were coming down, what would the ordinary man have done? If I were Mr. Miller and I was in business and the plaintiff corporation purported to ship me ten carloads of cattle that I had no contract with and hadn't ordered, I probably would have 'blown my top' . . . I probably would have said, 'What is going on here? You fellows are shipping me cattle that I didn't order,' and then you find him proceeding to assist in arranging for the sale elsewhere." [Tr. 120.]

4. THE DEFENDANT CORPORATION'S RECORDS SHOW THE EXISTENCE OF AN AGREEMENT.

The Court's attention is directed to Plaintiff's Exhibits 2A to D, inclusive, being the records of defendant's slaughtering operations of these and other cattle from October 12 to October 15, 1948, inclusive, and to Plaintiff's Exhibit 2E being taken from Exhibits 2A to D, inclusive, and showing the record only so far as the slaughter of the cattle in question is concerned. The cattle in question are entered as Lots 37, 39, 43, 54 and 60. It will be noted that the records are that Lot 39, consisting of 63 head, Lot 43, consisting of 60 head, Lot 54, consisting of 60 head, and Lot 60, consisting of 59 head, *each had the identical percentage of dressed weight to live weight, viz: 50.02%* This would mean that four separate lots of 63 head, 60 head, 60 head and 59 head, the cattle being taken at random to make up such lots, all dressed with the identical percentage of dressed weight to live weight! This

is preposterous. If the Court will look at Exhibits 2A to D, inclusive, under the column "yield", it will see that no two of the percentages of yield of dressed weight to live weight of any of the other lots are the same, except the lots comprising plaintiff's cattle.

It must, of necessity, be inferred, therefore, that these cattle were considered by the defendant (and its records were kept) on quite a different basis than that of any other cattle slaughtered at this time. The only explanation of this is that the defendant, knowing of its agreement to pay 46¢ a lb. for beef dressed from the cattle, and 2¢ a lb. for offal, kept its records with this obligation in mind.

F. No Action of Plaintiff Was Inconsistent With the Existence of an Agreement With Defendant.

Defendant endeavors in its brief, as it did at the trial, to make some point of the fact that Mr. Swanson showed these cattle to buyers at Williams Lake and Vancouver. This has no significance whatsoever in view of the fact that the *agreement was not for any particular cattle* but was merely for any approximate 250 head of killable fat cattle. Plaintiff could have shipped any cattle meeting these specifications. It is undisputed that plaintiff had at their ranches a herd of some 4,500 head, and had 500 to 600 head ready for market in September of 1948 [Tr. 47]. Plaintiff could have complied with the offer by shipping any killable fat cattle of an approximate number of 250 head.

Nor was any action of Mr. Swanson after he arrived in Los Angeles inconsistent with the existence then of the agreement. The cattle were unloaded at the Union Stockyards in the afternoon of Thursday, October 7 [Tr. 106]

and the time limit within which they had to be slaughtered expired on Tuesday, October 12 [Tr. 105]. It is customary after a long trip, to give cattle several days rest. The Union Stockyards, from which the Southwest Commission Company operates, is the only outlet for cattle in Los Angeles [Tr. 78]. These Stockyards did not operate on Saturday, October 9, or Sunday, October 10, and Tuesday, October 12, being a legal holiday, they were closed [Tr. 108]. Mr. Swanson was, in view of Mr. Miller's repudiation as he said, "in a spot." [Tr. 68.] The cattle had to be slaughtered by Monday, October 11, under the Department Regulations. He accompanied Mr. Miller to see Mr. Hill of the Southwest Commission Company only *after* Mr. Miller had repudiated [Tr. 69 and 70]. He did not authorize the diversion nor did he employ the Southwest Commission Company [Tr. 77]. Knowing of the agreement respecting the cattle and that as they had been delivered they were now defendant's property, it was not for him to object either to Mr. Miller diverting them or placing them in the hands of Mr. Hill for sale. All of his actions were entirely consistent with the existence of the agreement in question. Mr. Hill was able to procure from the Department in Washington an extension of the time under the regulations to Friday, October 15 [Tr. 107], but this was subsequent to the aforementioned acts of Mr. Miller and, as the cattle were sold to Mr. Miller on Monday, October 11 [Tr. 107], the extension was of no consequence.

Accordingly, defendant having made a continuing offer to purchase from plaintiff for a stated price approximately 250 head of cattle to be delivered to it in Los Angeles and plaintiff having accepted such offer by so delivering 248 head, there was an agreement between the parties.

III.

The Terms of the Agreement Were Definite and Certain and Were Fully Performed by Plaintiff.

Point I-c, page 15, *et seq.*, of Appellant's Opening Brief consists of the bare statement that the agreement is not enforceable as the terms are "indefinite and uncertain." No specification whatever is given as to how or in what manner the terms were either indefinite or uncertain. On the contrary, the terms of the agreement were definite and certain and plaintiff performed all of its undertakings thereunder.

A. The Agreement Was Definite and Certain as to Subject Matter.

The subject matter of the agreement discussed by Mr. Wade and Mr. Miller on September 8 and September 10, was approximately 250 head of killable fat cattle [Tr. 37, 41, 45]. 248 head of killable fat cattle were consigned by plaintiff to defendant and would have been delivered to defendant had defendant not, itself, diverted the cattle elsewhere [Tr. 33].

B. The Price to Be Paid for the Cattle Was Definite and Certain.

In both conversations of September 8 and of September 10, Mr. Miller agreed on behalf of the defendant to pay a minimum price of 46¢ per pound of beef dressed from said cattle, plus 2¢ per pound of offal yielded by said cattle, and judgment herein was rendered upon this basis.

**C. The Time for the Delivery of the Cattle in Los Angeles
Was Agreed to.**

It was understood that the cattle would be shipped by rail [Tr. 41], that they would be ready for shipment from plaintiff's ranches before October 1, 1948 [Tr. 38 and 45], that they would be shipped to defendant in Los Angeles [Tr. 42], and that they would require about 10 days in transit [Tr. 38]. Hence, delivery in Los Angeles was to be made any time before October 10.

Plaintiff shipped the cattle by rail, routing them by the fastest and best manner available [Tr. 46 and 47] and the cattle arrived in Los Angeles on October 6 [Tr. 33]. The place of delivery was definite and certain, it being understood by both Mr. Miller and Mr. Wade, from their conversations of September 8 and September 10, that the cattle would be delivered to the yards of the Union Packing Co. in Los Angeles and Mr. Miller so instructed Mr. Swanson in his conversation with him September 24-28 [Tr. 49].

Plaintiff, pursuant to the agreement, consigned the cattle to the Union Packing Co. yards in Los Angeles [Tr. 84] and they would have been so delivered on October 6, had defendant not caused them to be diverted elsewhere.

IV.

Defendant Repudiated the Contract Because of the Admitted Drop in the Market for Dressed Beef and Because of the Admitted Cancellation by the Government of Substantial Contracts for the Purchase of Dressed Beef.

A. Defendant Repudiated the Contract Because of the Drop in the Market Price of Dressed Beef From September 8th and 9th Levels to the October 1st—4th Levels.

Plaintiff's Exhibits 14 and 15, being the Federal-State Market News Service of the United States Department of Agriculture, show that on September 10, 1948, the market of sales of commercial grade dressed beef from packers to retailers was \$48 to \$50 per 100 lbs. for cattle weighing between 350 and 600 lbs., and \$46 to \$48 for cattle weighing between 600 lbs. and 700 lbs. Whereas, on October 7, 1948, the market price had dropped to \$43 to \$46 per 100 lbs. for cattle weighing between 350 and 600 lbs., and to \$40 to \$43 per 100 lbs. for cattle weighing between 600 and 700 lbs.

Mr. Miller testified that his company operated on a 1-½% net profit [Tr. 116]. Accordingly, on September 8 and 10, when his mean selling price as seen above was \$48 per hundred lbs. of dressed beef, he could purchase the cattle from defendants at the contract price of \$46 per 100 lbs. of dressed beef and net a substantial profit. On the other hand, on October 7, when the mean selling price of dressed beef was as seen above \$43 per 100 lbs. of dressed beef, he would lose money by taking the beef at

the contract price of \$46 per 100 lbs. Not only would he then be selling for less than his purchase price, but he would also have his expenses in connection with slaughter, packing, etc.

Nor is the situation from defendant's standpoint any different if the period of October 1st to October 4th is taken, for as seen from Plaintiff's Exhibits 14 and 15, the market price of dressed beef for this period was \$46 to \$49 per 100 lbs. for cattle weighing 350 to 600 lbs., and \$45 to \$46 for cattle weighing 600 to 700 lbs.

Not only did the market drop between September 8-10th and October 1st to 7th, as above stated, but Mr. Miller admits that the market dropped between the conversation on September 24-28 with Mr. Swanson (when Mr. Miller told Mr. Swanson to send the cattle down to him as he had a deal) and the arrival of the cattle in Los Angeles [Tr. 97].

It was entirely true, as Mr. Miller testified: " . . . I knew if I would have received those cattle at our plant, slaughtered them and paid them their value, I would be the fall guy." [Tr. 87].

B. Defendant Repudiated the Contract Also Because of the Cancellation of Government Contracts.

When, on September 8 and 10 Mr. Miller agreed to buy the cattle at the stated price, and also on September 24-28 when he told Mr. Swanson to send them down as he had a deal, defendant had five contracts with the United States Government to supply it with an aggregate of 200,000 lbs.

of dressed beef [Pltf. Ex. 13]. Apparently, while the cattle were in transit, these contracts were cancelled by the Government, effective October 4, 1948 [Pltf. Ex. 13]. Accordingly, defendant needed cattle for 200,000 lbs. of dressed beef less than was needed to fill its requirements prior to the cancellation of these Government contracts. This diminution of defendant's need was attempted to be met by repudiating the agreement with the plaintiffs, whose cattle produced 148,015 lbs. of dressed beef [Tr. 52].

Appellant attempts to answer this by stating that these Canadian cattle could not have been used to fulfill the Government contracts. There is, however, not a scintilla of evidence in the record to support this contention. The claim is further without merit because it is the defendant's total needs to fill all of its requirements that is the proper consideration rather than cattle from any particular source to fulfill the requirement of any particular contracts.

The trial court justifiably attached significance to the foregoing explanation "of why Mr. Miller changed and contended he had no deal," for it observed:

" . . . the physical facts of the market are shown by Exhibits 14 and 15, and are most significant in that apparently during the month of September the market was up pretty far, 47¢, 48¢, 50¢. Mr. Miller has testified that their profit on turnover was a very minor one of 1% or more on the turnover. It was observed, therefore, that with the market in that shape he could have taken this meat, turned it over and made

money. . . . But the market drops and it would not have been possible to turn the meat over.” [Tr. 125.]

Referring to the cancellation of the Government contracts, the Court says:

“The Army contracts total some 200,000 pounds of meat. As long as those contracts continued, whereby the defendant could process meat and sell it for some 60¢, he could well have afforded, regardless of what happened to the market, to have bought this meat at 46¢ and not necessarily used this meat to fulfill the contract, but lots of meat was being handled and it just meant that there was 146,000 pounds of meat available for his needs. But the minute those contracts were cancelled, and the record does not show that he knew beforehand that they were going to be cancelled, but the practical matter is that somewhere before the 4th of October probably he had some notice of it, certainly he did on October 4, that he was not going to need as much meat as he had needed before. . . . He was not in a position to take 46¢ meat and turn it over at a profit as he could under the Army contracts.” [Tr. 124.]

“I attach significance to those two facts, not dependent upon human testimony, as being the possible explanation of why Mr. Miller’s attitude changed and he contended he had no deal.” [Tr. 125.]

V.

Defendant, by the Words and Conduct of Its President and General Manager, Is Estopped to Assert the Statute of Frauds.

Sections 1624A and 1724 of the Civil Code of California, and Section 1973A of the Code of Civil Procedure of California, as amended in 1931, provide:

“A contract to sell or a sale of any goods . . . of the value of \$500 or upward shall not be enforceable by action unless the buyer shall accept part of the goods . . . and actually receives the same, or gives something . . . in part payment . . .”

“There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.” (Emphasis ours.)

The trial court found that the defendant is estopped to assert the Statute of Frauds [Conclusions of Law III, Tr. 19; and Findings VIII to XVI, inclusive, Tr. 10, *et seq.*].

This Court has held that it will not interfere in the determination by the trial court of the application of equitable estoppel in the absence of an abuse of discretion. In the case of *Schnick Service v. Jones* (1949), C. C. A. 9, 173 F. 2d 969; *certiorari* denied 70 S. Ct. 62, 338 U. S. 819, 94 L. Ed., the Court at page 977 said:

“It has also been held by the California courts that *a trial court has considerable discretion in determining the application of equitable estoppel, and an Appellate Court should not interfere in the absence of abuse of discretion. Flint v. Giguiere*, 50 C. A. 314, 195 Pac. 85.” (Emphasis ours.)

A. Defendant Is Estopped to Assert the Statute of Frauds by Reason of the Facts That Its President and General Manager, Between September 24th and 28th, and Before the Cattle Were Shipped, Acknowledged the Agreement and Directed Plaintiff to Ship the Cattle to the Defendant.

Mr. Miller admits that following the making of his offer, he had a telephone conversation with Mr. Swanson, the subject of which was the sending of the cattle to defendant at Los Angeles [Tr. 115]. This occurred between September 24th and 28th. Mr. Wade and Mr. Swanson both testified that during this conversation Mr. Miller told Mr. Swanson to send the cattle down, as he had a deal [Tr. 49]. *Mr. Miller himself admits that in this conversation he instructed Mr. Swanson to send him the cattle* [Tr. 117].

This constituted an acceptance of the cattle by Mr. Miller under Section 1624A and 1724 of the California Civil Code, and Section 1973A of the California Code of Civil Procedure, inasmuch as thereby "the buyer . . . before . . . delivery of the goods expresses by words . . . his assent to becoming the owner . . ."

The facts of *Platt v. Union Packing Co.* (1939), 32 Cal. App. 2d 329, 89 P. 2d 662, are identical with those of the principal case, even to the extent of the same party defendant and Mr. Miller as the principal witness. In that case, also, Mr. Miller offered to purchase cattle at a stated price and before delivery the market dropped (as in this case), and, as here, Mr. Miller attempted to repudiate his contract and relieve himself of his obligations by asserting the Statute of Frauds.

In holding that defendant's action in advising plaintiff after the continuing offer was made "that defendant

wanted and would take the steers” estopped defendant from asserting the Statute of Frauds, the Court at page 333 said:

“The Arizona statute of frauds (Sec. 2808, Rev. Code of Arizona) is similar to our own (sec. 1734, Civ. Code; sec. 1973a, Code Civ. Proc.), and thereunder *any act of the vendee manifesting an intention on his part to accept the chattels or some part thereof places the transaction without the pale of the statute of frauds*, and a selection of portions of the vended property may be evidence of an acceptance.” (Emphasis ours.)

In *Rutland, Edwards & Co. v. Cooke* (1941), 44 Cal. App. 2d 258, 112 P. 2d 287, defendant instructed his stockbrokers to purchase for his account certain stocks, and after the purchase refused to pay therefor and set up the Statute of Frauds as a defense. The Court held that defendant was estopped to assert the Statute of Frauds inasmuch as, after being informed of the purchase and that the value had risen, the defendant replied that the profit was not big enough. The Court at page 263 said:

“This alone is sufficient to bring the case within the exception of Sec. 1624A of the Civil Code as an expression of ‘by words or conduct is assent to becoming the owner of those specific goods.’”

B. Defendant Is Estopped to Assert the Statute of Frauds by Having Induced Plaintiff to Make Large Expenditures in the Performance of the Agreement.

Following the September 24-28 conversation, in which Mr. Miller told Mr. Swanson to send the cattle down as he had a deal, and in reliance upon the agreement, defendant expended to fulfill that agreement the sum of \$6,327.12 in freight charges to transport the cattle to Los Angeles

[Pltf. Ex. 7], together with the sum of \$3,822.00 for United States Customs duties [Pltf. Ex. 8], or a total sum of \$10,149.12. The expenditure of these sums is undisputed.

It is well settled that one who induces another by words or conduct to expend money or to part with value in reliance that the agreement will be carried out, is estopped to assert the Statute of Frauds.

“The appellants by their language and conduct led the respondent to make expenditures in the purchase of the shares of stock upon the supposition that the contract was to be carried into execution and for that reason they are estopped to deny the contract.” *Rutland, Edwards & Co. v. Cooke* (1941), 44 Cal. App. 2d 258, at 263, 112 P. 2d 287.

“But be that as it may, under the circumstances of the case, as we are required to view it, appellant is estopped from urging the statute of frauds. Flint performed his part of the agreement. He surrendered his property right upon the faith of Giguere’s promise to pay one dollar per head. Having received the benefit of that agreement with Flint, it would be unjust and inequitable for defendant to repudiate it upon the ground that the contract was not in writing. Many refinements and much learning on the subject are displayed in the books and the decisions, but we think it can be safely said that in cases like this where one of the parties has performed his obligation, has suffered the detriment contemplated by the agreement, and the other party has fully received the benefit of the transaction, the chancellor has a large discretion in determining whether it would be inequitable to allow the party who gains by the contract to take refuge under the statute of frauds, and unless it can be said that such discretion has been abused, an ap-

pellate court will not interfere.” *Flint v. Giguere* (1920), 50 Cal. App. 314, at 320, 195 Pac. 85. (Quoted with approval in *Tobola v. Wholey* (1946), 74 Cal. App. 2d 351, at 357, 170 P. 2d 952.)

C. Defendant Is Estopped to Assert the Statute of Frauds by Reason of Having Failed to Communicate With Plaintiff Upon Receipt of the Telegram Advising Him That the Cattle Were Being Shipped.

Prior to plaintiff incurring the \$10,000 expense referred to above, and prior to plaintiff incurring the hazard to its cattle, referred to below, plaintiff's officer advised defendant's President by telegram that the cattle were being shipped to him from Vancouver, B. C. [Pltf. Ex. 1]. Mr. Miller recklessly disregarded plaintiff's interests in not making proper efforts to contact plaintiff if he did not intend to accept the cattle upon arrival. Mr. Miller testified that his *only* effort on receipt of the telegram was placing a telephone call to Mr. Swanson at the Vancouver stockyards [Tr. 83] and that he made no effort to reach Mr. Swanson at any hotel in Vancouver, nor did he try to locate Mr. Swanson through his home in the Pasadena area (although he must have known where Mr. Swanson lived, having known him for some twenty years) [Tr. 79], nor did he make any effort to contact anyone at the plaintiff's ranches, nor did he attempt to reach Mr. Wade at his office in Los Angeles nor Mr. Jaffe at either his Los Angeles office or his residence in Beverly Hills. However, it was not for the purpose of telling Mr. Swanson not to send the cattle that he made the single effort to reach him at the Vancouver stockyards, *but it was only, as Mr. Miller himself testified, in order to advise Mr. Swanson of the market conditions in Los Angeles* [Tr. 114].

In *Fidelity Surety Co. v. Millsbaugh and Irish Corp.* (1926), C. C. A. 7, 14 F. 2d 937, at page 939, the Appellate Court concluded that "The knowledge and active participation of the (surety) company . . . as well as the acts of its general agent . . . indicate not only its consent, but its desire that the obligations should be renewed. . . ." and, accordingly, the Circuit Court sustained the trial court and affirmed its judgment that the defendant was estopped to assert the Statute of Frauds. "*The knowledge it thus had of what was being done, together with its participation therein and consent thereto, estop it from raising any such question*" viz., the *Statute of Frauds*. (Emphasis ours.)

D. Defendant Is Estopped to Assert the Statute of Frauds by Reason of the Conduct of Its President in Inducing the Plaintiff to Bring the Cattle Into the United States, Well Knowing That They Would Have to Be Slaughtered Within Approximately Four Days After Arrival at Los Angeles and so Depriving Plaintiff of a Reasonable Opportunity to Procure a Proper Price Therefor.

The Regulations of the United States Department of Agriculture required that these Canadian cattle be slaughtered within fourteen days after they entered the United States [Tr. 107], a circumstance which Mr. Miller knew [Tr. 85]. The cattle entered the United States on September 29, were unloaded in Los Angeles Thursday, October 7 [Tr. 106] and the time limit within which they had to be slaughtered expired Tuesday, October 12 [Tr. 105]. Saturday, October 9, Sunday, October 10, and Tuesday, October 12, were holidays and the Union Stockyards, the only place in Los Angeles where the cattle could be disposed of [Tr. 78], were closed on those days. Further-

more, it is customary after a long trip to water and feed cattle for a few days after their arrival in order to procure a proper price. Mr. Miller had been told previously by Mr. Wade that the cattle would be in transit approximately ten days [Tr. 38] and, therefore, knew that defendant would have only a bare four days within which to dispose of the cattle upon the market. Accordingly, by inducing the plaintiff to bring the cattle to Los Angeles he deprived plaintiff of any opportunity to properly market them.

One who induces another to change his position to his detriment upon the supposition that a contract will be fulfilled, is estopped to assert the Statute of Frauds.

“ . . . As said in *Wilson v. Bailey*, *supra*, page 423: ‘It is a general equitable principle, a part of the broader equitable doctrine stated in *Dickerson v. Colgrove*, 100 U. S. 578, 580 [25 L. Ed. 618] and quoted therefrom in *Carpy v. Dowdell*, 115 Cal. 677, 687 [47 P. 695], as follows: “*The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.*”’ [Emphasis ours.]

“Where a party, in reliance on a parol contract that should have been reduced to writing, has changed his position or parted with value so that it would be an injustice to permit the other party to rely on the statute of frauds, the doctrine of equitable estoppel will be invoked and the statute of frauds is not available to perpetuate the fraud. (*Grant v. Long*, 33 Cal. App. 2d 725, 740 [92 P. 2d 940] . . .)”

“Had it not been for Bisno’s promise, plaintiff no doubt could have arranged with the owner to receive the entire amount of Bisno’s offer and to pay plaintiff therefrom a commission of \$2,500. The finding, supported by the evidence, that Bisno orally agreed to pay the \$2,500; that in reliance thereon plaintiff irremediably changed his position to his detriment by releasing the owners of the property from any obligation to pay him a commission is sufficient to support the court’s conclusion that the statute of frauds was not available to Bisno. (*Columbia Pictures Corp. v. De Toth*, 26 Cal. 2d 753, 759 [161 P. 2d 217, 162 A. L. R. 747]; *Halsey v. Robinson*, 19 Cal. 2d 476, 481 [122 P. 2d 11]; *Vierra v. Percira*, 12 Cal. 2d 629 [86 P. 2d 816]; *Wilson v. Bailey*, 8 Cal. 2d 416 [65 P. 2d 770].)”

LeBlond v. Wolfe, 83 Cal. App. 2d 282, at pp. 286, 287, 188 P. 2d 278.

In *Seymour v. Oelrichs* (1909), 156 Cal. 782, 794, 106 Pac. 88 (referred to in *Notten v. Mensing* (1935), 3 Cal. 2d 469, 474, 45 P. 2d 198, as “the leading case in this State”), the scope and application of the doctrine of equitable estoppel is set forth in the following language:

“The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle ‘thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.’ (2 Pom-

eroy's Equity Jurisprudence, sec. 921.) It was said in *Glass v. Hulbert*, 102 Mass. 24, 35, [3 Am. Rep. 418]: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' This state has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. . . ."

In the *Seymour* case the plaintiff was induced to change his situation by giving up a position with the Police Department in reliance upon the "words and conduct" of the defendant that he would be given other employment. The Court held the party making such inducement to be estopped from asserting the Statute of Frauds. Similarly, in the principal case plaintiff was induced by defendant's President to change its situation by bringing its cattle to Los Angeles where they had to be slaughtered within four days after arrival, which plaintiff did in reliance upon words and conduct of defendant's President that it would pay the agreed price therefor. In both cases the words and conduct of the defendant made it impossible for the

plaintiff to be placed in *status quo*. Consequently the doctrine of equitable estoppel is equally applicable in both cases.

E. All of the Cases of This Court Cited by Defendant Recognize the Doctrine of Equitable Estoppel.

Defendant appears to get great comfort from the case of *E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (1938), C. C. A. 9, 97 F. 2d 402. Here defendant through its agent made a written offer to sell plaintiff lumber at a stated price. Thereafter defendant notified its agent that the offer was unacceptable and to "clear his skirts" of it. Subsequently plaintiff advised defendant it accepted the offer. Upon defendant's refusal to deliver, plaintiff purchased lumber in the open market and brought suit. Defendant interposed the defense of the Statute of Frauds upon the ground that its agent had no written authority to make the offer. *The holding of the case is simply that no facts were shown to estop the defendant from asserting the Statute of Frauds.*

However, this Court fully recognized the application of the doctrine of equitable estoppel when there are sufficient facts upon which to do so. *Immediately following the portion quoted by counsel on page 21 of the Appellant's Brief, this Court continued:*

"In this case there is no evidence from which it could be inferred that appellee represented either that its agent had written authority or that it would not avail itself of the defense of the statute. * * * Appellee could in no way be estopped to assert the defense of California Civil Code, sec. 2309, *unless it represented that its agent was authorized to enter into contracts required to be in writing.*" (Page 409.) (Emphasis ours.)

At page 20 of Appellant's Opening Brief counsel quotes a portion of the trial court's comment in connection with this case; but counsel did not continue to read the above quoted portion of this decision, nor does he quote it to this Court.

In the *Wood Lumber Co.* case the Court fully recognized the doctrine of equitable estoppel to assert the Statute of Frauds but merely held that the facts therein presented did not warrant its application.

Counsel also cites *Georgia Peanut Co. v. Famo Products Co.* (1938), C. C. A. 9, 96 F. 2d 440. Again this Court held therein that there were no facts to justify the application of the doctrine of equitable estoppel. However, there can be no doubt that the Court recognized that the doctrine does apply when the facts warrant; for at page 441 this Court said:

"Since there is no binding contract, *the buyer can be estopped to deny its validity only by some prejudice to the seller caused by some affirmative act on which the seller relied.* We uphold the District Court's finding that there was no such action on the part of the buyer." (Emphasis ours.)

Also, relied upon by defendant is *Cincinnati Distributing Co. v. Sherwood & Sherwood Co.*, C. C. A. 9, 270 Fed. 82. Here again this Court recognized the doctrine of equitable estoppel to assert the Statute of Frauds in the following language found at page 83, *et seq.*:

"It is true that a contract may be within the Statute of Frauds, *yet if the conduct of the party who relies upon the statute has been such as to raise an equity outside of and independent of the contract, he may be estopped to make that defense.* 20 Cyc. 308." (Emphasis ours.)

VI.

The Findings Support the Judgment.

In Point III of Appellant's Opening Brief (p. 31) and to support its erroneous contention that the Findings are irreconcilable with the existence of a contract, appellant says Finding V [Tr. 9] declares that the conversation of September 8 created an oral contract. Finding V does not so state. It further says that Finding VI [Tr. 9] states that the telephone conversation of September 10 confirmed this oral contract. Finding VI does not so state. These contentions are simply due to a misreading of Findings V and VI. Finding V and Finding VI are findings directed to the making of the offer and the confirmation thereof. The oral contract came into being when plaintiff accepted this offer as found in Finding IX [Tr. 11], and thereupon the Court concludes, in Conclusions of Law III [Tr. 19] that a contract resulted from such offer and acceptance.

Under Point III of Appellant's Brief (p. 31 *et seq.*), appellant also contends that the recovery should have been for damages under Section 1784 of the Civil Code of California, rather than for the balance of the unpaid purchase price. However, Civil Code, Section 1784, was held not applicable to a situation where the buyer repudiated a contract providing for the payment of the purchase price at a time certain (as in the principal case upon delivery of the cattle), but rather the California Code, Section 3302, governs, in *Union Liquors, Inc. v. Finkle & Lasarow, Inc.* (1941), 44 Cal. App. 2d 706, 113 P. 2d 19.

Civil Code, Section 3302, provides: "*Breach of contract to pay liquidated sum.* The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with in-

terest thereon." In an action to recover a sum of money where the consideration has passed to the obligor, Civil Code, Section 3302, was held to apply in *Williams v. Marshall* (1921), 54 Cal. App. 24, 200 Pac. 1058, and *Nielson v. Swanburg* (1929), 99 Cal. App. 270, 278 Pac. 876.

The title to these cattle having passed to the buyer (whether buyer accepted possession thereof or not) by reason of seller having complied with the terms of the agreement in delivering the cattle, California Civil Code, Section 1783(1), would also apply with the same result as Section 3302, viz., plaintiff is entitled to "the amount due under the terms of the obligation." Civil Code, Section 1783(1), provides:

"*Action for the price.* (1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods."

And, in *Johnson v. Besoyan* (1948), 85 Cal. App. 2d 389, 183 P. 2d 63, the Court held that the action by a seller against a buyer who neglects to pay for goods when title has passed, is on the contract and not for damages for breach thereof, and that the measure of damages is under Civil Code, Section 1783, for the agreed price under the contract.

Accordingly, the amounts recoverable herein is not damages under Civil Code, Section 1784, but is, as applied by the trial court, the sum due under the contract, pursuant to Civil Code, Sections 3302 and 1783(1).

However, the question is merely academic. If as defendant contends the measure of recovery is the difference

between the contract price and the current price (Civil Code, Sec. 1784) the sum to which plaintiff is entitled is the same. The "current price" would be the sum paid for the cattle, viz.: 21½ cents per pound. This sum plus the expenses of the Southwest Commission Company subtracted from the contract price results in the same figure as the judgment rendered.

Conclusion.

The decision of the trial court that there was an agreement between the parties arising from the defendant's offer and the plaintiff's acceptance thereof and that the defendant by the words and conduct of its principal officer is estopped to assert the invalidity of that agreement by reason of the Statute of Frauds is abundantly supported by substantial evidence. Therefore, this Court should affirm the Judgment.

Respectfully submitted,

FREDERICK W. MAHL, JR.,
Attorney for Plaintiff and Appellee.

No. 12703.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACKING COMPANY,

Appellant,

vs.

CARIBOO LAND & CATTLE CO., LTD.,

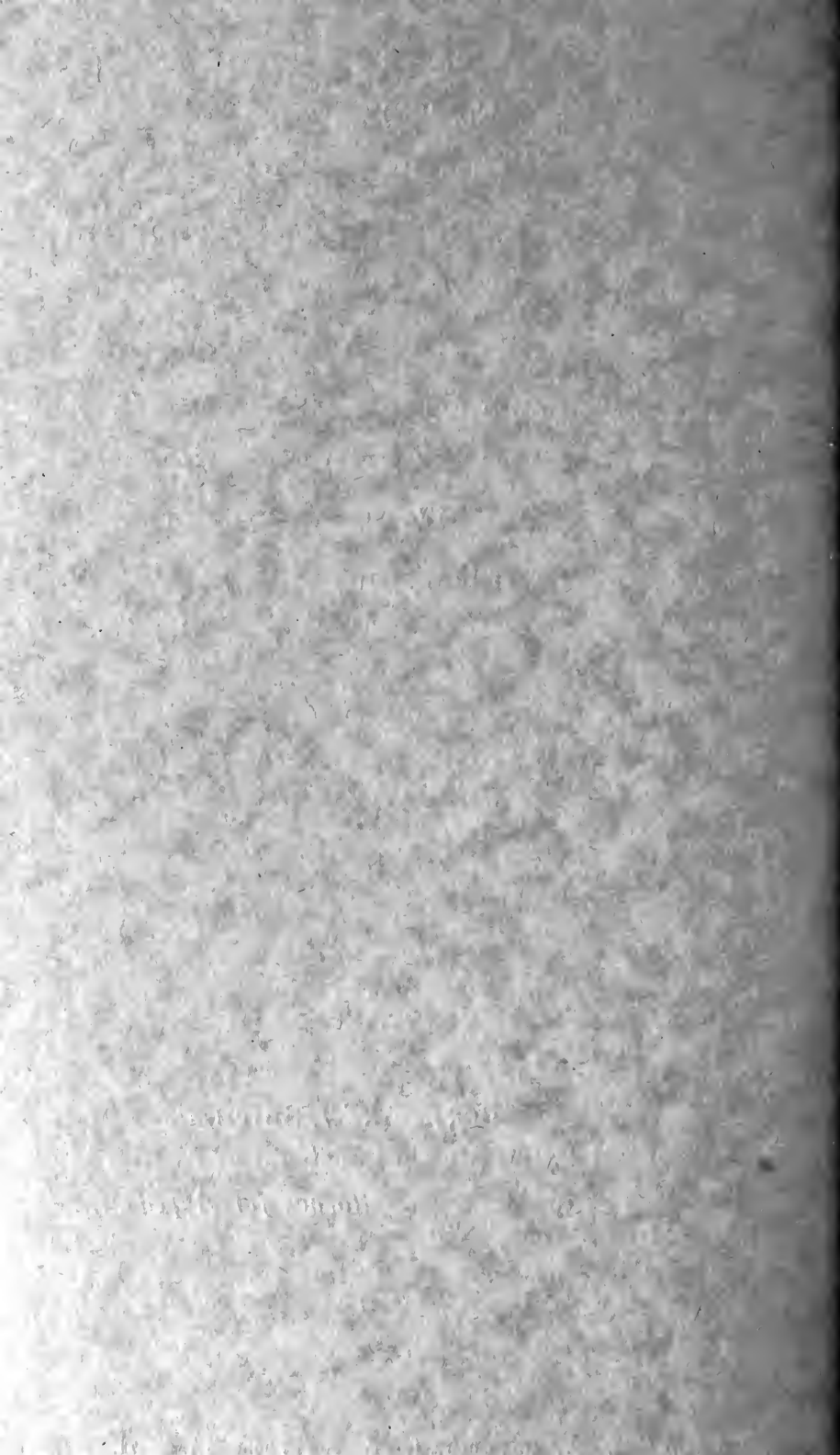
Appellee.

REPLY BRIEF OF UNION PACKING COMPANY

BENJAMIN W. SHIPMAN,

511 Pacific Mutual Building, Los Angeles 14,

Attorney for Appellant.



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IN THE
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UNION PACKING COMPANY,

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vs.

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Appellee.

**REPLY BRIEF OF UNION PACKING
COMPANY**

Introductory Statement.

Appellee's brief confirms our principal contention that an asserted oral contract so controversial and indeterminate in character, should not be enforced in disregard of the Statute of Frauds. When the Trial Court stated:

"This is probably the *closest* case I have had to decide since I have been on the bench." [R. 123.]

he was referring to the difficulty in evolving a contract out of the negotiations in the record. He had no difficulty with respect to the Statute of Frauds. He stated that automatically it became inapplicable if he found an oral contract was made. But he confessed the utmost difficulty in adducing such oral contract.

He refused to accept the plaintiff's contention that a contract was made as alleged in the complaint [R. 3] but found only a "continuing offer" which was accepted by delivering the cattle. Appellee has abandoned the case made by the complaint and now asserts that the negotiations

of September 8 and 10, alleged in the complaint to constitute “an oral contract” [R. 3], were merely a continuing offer which plaintiff accepted in October “by so delivering 248 head” (Appellee’s Brief, p. 19).

Thus the very act which it is alleged constitutes the acceptance of the offer is also the act which is claimed to take the contract out of the Statute. There is of course no authority cited for such a monstrous legal theory.

On the defense of the Statute of Frauds the appellee’s position is simply that the application of the Statute is a matter of discretion, not subject to review on appeal. This position is equally vicious. Whether the Statute has been satisfied depends on the application of legal principles. It is a question of law. The trial court recognized this when he stated:

“If I am wrong on the law, you have your remedy of appeal.” [R. 128.]

Assuming that the application of the Statute is a matter of discretion, it is clear that the trial court exercised no legal discretion, but simply remitted defendant to its remedy on appeal as upon a question of law. [R. 128.] At the same time he stated that he would not follow the decision of this court in *Wood v. Moore*, 97 F. 2d 920:

“With all due respect to my superior, Judge Stephens, I do not think that is the law. I think that goes too far.”

Accordingly, the decision cannot be sustained on the plea of an exercise of judicial discretion in accordance with legal principles, in disregarding the Statute of Frauds.

The foregoing considerations dispose of the principal points made by appellee. These will now be taken up in detail.

ARGUMENT.

I.

**There Was No Proof of the Oral Contract Alleged.
There Was No Contract in Writing, and No Satisfactory Proof of an Oral Contract.**

The complaint alleged "on or about the 10th day of September, 1948, plaintiff and defendant entered into an oral contract . . ." [R. 3.] No other contract was alleged. When there was a failure of proof on this issue, the trial court suggested on the hearing of the motion for nonsuit.

"From the standpoint of what is the plaintiff's strongest position, you have Mr. Miller making an offer. It is a continuing offer until it is revoked. Certainly it would continue for a reasonable time." [R. 102.]

This idea of a continuing offer on September 8th, reaffirmed on September 10th, and accepted by delivery to defendant is carried into the findings and is asserted many times in appellee's brief (pp. 4, 14, 19, 37):

"defendant had made a continuing offer to purchase approximately 250 head of cattle delivered in Los Angeles for a stated price and that the plaintiff had accepted such offer by delivering 248 head" (p. 4).

"The delivery of these cattle in Los Angeles consigned to defendant constituted an acceptance of the offer and as a result a contract was created between the parties" (p. 14).

"Accordingly, defendant having made a continuing offer to purchase from plaintiff for a stated price approximately 250 head of cattle to be delivered to it in Los Angeles and plaintiff having accepted such offer by so delivering 248 head, there was an agreement between the parties" (p. 19).

Appellee therefore has abandoned entirely the contract sued upon—*i.e.*, the alleged oral contract of September 10, 1948 [R. 3]. It relies entirely upon the theory of a continuing offer accepted by performance on its part, *i. e.*, by delivering the cattle in Los Angeles four weeks later.

The very suggestion of such a continuing offer to remain in effect in a fluctuating market for such a long period is so preposterous that it calls for the clearest proof. No such proof exists.

Appellee first refers briefly to the conversations of September 8th and 10th (p. 11). This reference is incomplete and will be found at length in Appellant's Opening Brief, pages 10-11. But in the portions quoted by appellee will be found defendant's offer stating:

"Send them on down.

"You tell Swanson to send them on down." (pp. 11, 12).

Certainly this does not amount to an offer to continue in effect three or four weeks. Nothing whatsoever appears to support the holding that there was a continuing offer. It would be folly to suppose that a responsible concern would do business in that way, yet on such nebulous supposition an oral contract is enforced, in violation of the Statute of Frauds to pay more than \$70,000 as the purchase price of cattle delivered on October 7th, a full four weeks later (Appellee's Brief, p. 13).

Appellee then refers to the telephone conversation of September 24-28 between Swanson and Miller, defendant's officer (p. 13). The reliance is upon the witness Jaffe, an officer of plaintiff, who stated he stood near the phone and heard Miller say "he had a deal." This testimony is not sufficient to show a continuing offer by Miller.

In the first place Swanson positively denied any such statement was made.

“The Court: *Do you remember him saying anything about he had a deal?*”

The Witness: *No, we didn't discuss that on the telephone.*”

This was the testimony of the party representing plaintiff, who was doing the talking on the phone, and by whose testimony plaintiff was bound.

Also it is difficult to recognize the asserted admission by Miller that he had a deal, with the court's finding that defendant a few days later denied the existence of a contract because the market had dropped. Again the court itself finds no support in the record for the plaintiff's original contention that there was a contract at this time. He expressly finds there was not [R. 102] and that there was only a continuing offer.

How then can Jaffe's testimony be held to establish a contract? Certainly none was found.

Reference is then made to the telegram of Swanson to Miller on September 28:

“Ten cars leaving noon today *flying down see you tomorrow*” (p. 14).

But this telegram is more consistent with the absence of a contract than with the existence of one, else why the necessity of flying down to see Miller immediately, when the cattle would not arrive for ten days. In any event no contract is found to exist by reason of such telegram.

Appellee next refers to the “inaction” of Miller on receipt of the telegram (p. 14). But the wire had said that Swanson would be in Los Angeles “tomorrow.” There was nothing Miller could do except try to reach him by telephone as he did. The “inaction” instead of constituting “evidence that he believed there was an agreement” (p. 15), is rather *evidence that he did not so believe* and had no idea one was asserted. At any rate it is not found that the telegram constituted a contract. It is equally clear that it did not constitute a contract, but only an arrangement for negotiations.

It is next asserted (p. 15) that the custom in the business to consign to the buyer makes such consignment evidence of an agreement. No cases are cited. It is elemental that custom cannot *create* a contract or evidence the existence of one. It is important only on the matter of interpretation of contract terms. There is no finding that such custom evidenced contract. If such a finding were made it would be clearly erroneous.

It is asserted that appellant’s assistance in disposing of the cattle in Los Angeles and its willingness to pay a premium of $\frac{1}{2}\phi$ per pound above the highest offer obtained by the Commission Company is “evidence that Mr. Miller knew that he had an agreement for their purchase” (pp. 16-17).

But it is undisputed that as soon as Swanson arrived in Los Angeles and at their very first meeting Miller unequivocally denied the existence of an agreement [R. 13],

and has denied it all times thereafter. Appellant also refused to accept delivery [Finding XVII, R. 13-14]. There was no occasion for Miller "to blow his top" (p. 17).

Admittedly defendant's officer was an old friend of Swanson. Defendant cannot reasonably be penalized under these circumstances for assisting Swanson in disposing of the cattle or for paying a premium over the highest price otherwise obtainable by the Commission Company. Such conduct can furnish no legal support for inferring a contract which did not theretofore exist and which even the trial court found did not exist prior to delivery of the cattle in Los Angeles.

If appellant's officer changed his mind about the desirability of the purchase at any time prior to October 7 when the cattle were delivered in Los Angeles he had the legal right to withdraw any offer to purchase. That he did not do so is merely evidence that no such offer existed. Proof that the offer was made and was left open and was accepted in accordance with its terms would be necessary to show a contract. This lack of proof cannot be supplied by custom, assistance in diversion or a consideration of whether the purchase price paid to a third party for the cattle was more than someone else offered.

The reference to the appellant's records as showing four lots of the cattle with the identical percentage of dressed weight is entirely pointless, as the records are not challenged (p. 17).

Nothing else is suggested in support of the contract except the assertion that appellant repudiated the contract (1) because there was a drop in the market, and (2) because there was a cancellation of government contracts (pp. 22-25).

(1) The Drop in the Market.

The market decline is more truly evidence of a fictitious claim on the part of plaintiff, than it is of repudiation of contract by appellant. It was plaintiff who was thus motivated to falsely assert a prior contract at a fixed higher price. Appellant did not need to wait until the cattle arrived and then repudiate. It would have been free under the court's findings to withdraw its offer at any time prior to October 7. The obvious principle which must control this issue is that proof of motive will not supply evidence of the contract (Op. Br. p. 14).

(2) The Cancellation of Government Contracts.

Whether the government contracts were cancelled or not, Canadian cattle could not be used to fill such contracts under the Statute. That appellant was not oversupplied with cattle is obvious, for it did purchase the entire lot of plaintiff's cattle and use them. They constituted only about one day's regular kill [R. 87].

The evidence therefore on plaintiff's own theory is equivocal and far from convincing. It is only by distorting stray portions of testimony and by ascribing fraudulent motives, contrary to the statutory requirement that

honest dealing is to be presumed, that even a glimmer of support is adduced to plaintiffs' self-contradictory and self-impeached thesis.

The case as presented in our opening brief (pp. 1 to 3, and 9 to 18) is not challenged by appellee. Upon re-reading this portion the court must conclude that no binding contract was established. That the theory of continuing offer—as propounded by the trial court—in direct opposition to the plaintiff's pleadings, is unsupportable, and cannot be reconciled with the plaintiff's own evidence (1) that appellant on September 10 asked that the cattle be shipped immediately—not three or four weeks later; (2) that in the September 24-28 phone conversations appellee suggested that an attempt be made to sell the cattle in Canada; (3) that such attempts were actually made not only prior to shipment but during the course of transit; (+) in notifying the appellant of the shipping of the cattle plaintiff's agent said he was flying down to see appellant's officer next day and then consented to the diversion of the cattle to the Southwest Commission Company.

It is for the purpose of preventing such controversies coming to court that the Statute of Frauds was enacted. The flimsy and self-contradictory character of plaintiff's own evidence requires that the court consider carefully whether the situation measures up to that required of contracts which do not comply with the statute.

As stated in *Hamby v. Wise*, 181 Cal. 286, 289, there must be "evidence just as good as a writing of the agreement between the parties." Certainly that is not this

case. And in *Seymour v. Oelrichs*, 156 Cal. 782, 795, relied upon by appellee, the court adopts the rule of Browne on Statute of Frauds:

“A plaintiff—must be able to show clearly—not only the terms of the contract, . . .”

Here the trial court confessed that plaintiff's showing was unsatisfactory.

Purcell v. Miner, 4 Wall. 513, 517, 18 L. Ed. 435.

“A mere breach of a parol promise will not make a case for the interference of a chancellor. It is plain that a party who claims such interference has the burden of proof thrown on him. He knows that the law requires written evidence of such contracts, in order to show their validity. He has acted with great negligence and folly who has paid his money without getting his deed. When he requests a court to interfere for him, and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satisfactory, and indubitable proof—First—of the contract, and of its terms. Such proof must be clear, definite, and conclusive, and must show a contract leaving no *jus deliberandi*, or *locus penitentiae*. It cannot be made out by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject matter, which may have been imperfectly heard, or inaccurately remembered, perverted, or altogether fabricated; testimony therefore impossible to be contradicted.”

II.

There Was No Proof of Any Facts Sufficient to Take the Asserted Oral Contract Out of the Statute of Frauds.

This point was presented in Appellant's Opening Brief, pages 19 to 30. It is discussed in Appellee's Brief at pages 26-36. Most of the cases cited and points made by appellant are completely ignored by appellee.

Appellee argues by way of confession and avoidance that the trial court's findings with respect to the Statute of Frauds are not reviewable in the absence of an abuse of discretion (p. 26).

Such a contention amounts to a claim that the courts are not bound by the Statute of Frauds. This is not the law.

As stated in *Hambey v. Wise*, 181 Cal. 286, 289:

" . . . it is not to be forgotten that *equity is after all bound by the Statute of Frauds* and that, in general, relief is given against the statute only in two classes of cases, first, where to allow the statute to be set up would be to secure to the party relying upon it the fruits of actual fraud, and second, where to allow the statute to be set up would place the party resisting in an inequitable position, it appearing further that there is evidence just as good as a writing of the agreement between the parties."

Fraud is "requisite to an estoppel."

Zellner v. Wassman, 184 Cal. 80, 87.

This was also held to be the law in *Schick Service Co. v. Jones* (C. C. A. 9), 173 F. 2d 969, relied upon by

appellee (p. 26), where the plaintiff had suffered substantial loss in relying upon the oral agreement,

“thereby changing his position to his detriment, since he could not be returned to a position of non-disclosure,”

there was no basis for an equitable estoppel (p. 977). The reference to the trial court’s discretion can have no further significance than the actual holding in that case, and cannot be distorted into a statement of a universally applicable principle contrary to all prior decisions.

What the trial court there had held was that despite the various elements of damage sustained by plaintiff in reliance upon the alleged contract, no fraud had been shown sufficient to prevent the application of the statute. A holding denying equitable relief where the facts of damage and fraud are shown in the evidence—in the exercise of the court’s discretion—is *not* a holding that the court has discretion to abrogate the statute where such facts of damage and fraud do not appear. The elements of equitable estoppel must exist *before any occasion arises for the exercise of discretion*. These elements are clearly defined in the decisions of this court, and even in the case relied upon by appellee, *Seymour v. Oelrichs*, 156 Cal. 782.

A trial court can no more ignore these decisions than any other binding precedents. It is not within his discretion either to amend the Statute of Frauds, to nullify it, or to negate it by enforcing illegal oral contracts in violation of established legal principles.

In matters where the trial court does have the right or duty to exercise discretion it

“is not a capricious or arbitrary discretion, but an impartial discretion guided and controlled in its exercise by fixed legal principles.”

Here the court refused to consider the defense Statute of Frauds, frankly stating that if he found there was an oral agreement, he would hold the defendant bound. Realizing that he was ruling directly contrary to the decision of this court in *Wood v. Moore*, 97 F. 2d 920, he stated:

“The Court: With all due respect to my superior Judge Stephens, *I do not think that is the law. I think that goes too far.*”

The trial court himself did not consider that he was exercising discretion, saying:

“If I am wrong on the law, you have your remedy of appeal. It is *a lot casier to appeal on questions of law* than it is on questions of fact. *I have ruled against you on your view of the law*; therefore it is an easier kind of appeal to take.” [R. 128.]

Appellee emphasizes that appellant's officer Miller admits that he instructed Swanson to send him the cattle (p. 27). This is not true. This ignores the evidence of Swanson himself that Miller advised him to “try to sell them up there if you can” [Tr. 75]. This is also admittedly what appellee and Swanson did try to do.

In any event there was no acceptance of the cattle by appellant and the court so finds [Findings XVII and XVIII, R. 13-14].

Appellee asserts that the facts of *Platt v. Union Packing Co.*, 32 Cal. App. 2d 329, are identical (p. 27). Actu-

ally there is no similarity. There appellant officer's minor son with the assistance of King, a commission merchant, purchased certain cattle which were delivered, accepted, and paid for by appellant. The seller then successfully contended that the acceptance of these shipments operated to relieve from the Statute his asserted oral contract with the minor son and King for the purchase of a larger number of cattle still remaining on his ranch. No question of estoppel was involved.

In *Rutland, Edwards & Co. v. Cooke*, 44 Cal. App. 2d 258 (Appellee's Brief, p. 28), the defendant after his stockbroker notified him of a purchase and of an opportunity to resell, ordered the stockbroker to hold for a higher price. Defendant thus "assented to becoming the owner" under Civil Code, Section 1624A.

In *Flint v. Giguere*, 50 Cal. App. 314, 320 (Appellee's Brief, p. 29), the defendant had "fully received the benefits of the transaction." The same is true of the case of *Tobola v. Wholey*, 74 Cal. App. 2d 351, 357 (Appellee's Brief, p. 30).

In *Fidelity Surety Co. v. Millsbaugh and Irish Corp.*, 14 F. 2d 937, 939 (Appellee's Brief, p. 31), the surety company's obligation was in writing and it was contended that any extensions of the indebtedness guaranteed should also be in writing. But the court holds that the extensions having been requested by and given "for the benefit of the surety company," it was not thereby released from liability.

In *Le Blond v. Wolfe*, 83 Cal. App. 2d 282, 284 (Appellee's Brief, pp. 32-33), plaintiff was a real estate broker who negotiated a sale of certain property to defendant Bisno. Defendant "asked plaintiff to release the owners—from their obligation to pay him a commission

and to obtain from them a net price exclusive of any commission to plaintiff and that if plaintiff did so, he (Bisno) would pay plaintiff \$2500 for his services. Pursuant to Bisno's request and in reliance upon his oral promise to pay him \$2500, plaintiff released the owners from any obligation to pay him a commission and obtained a net offer to sell to Bisno for the previous asking price exclusive of any commission to plaintiff" (p. 284).

In *Seymour v. Oelrichs*, 156 Cal. 782, 793 (appellee's brief, pp. 33-34) there was a definite promise to enter into a written contract (*E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.*, 97 F. 2d 402, 409), and the court further held that acts of part performance such as are relied upon by plaintiff are not sufficient, saying:

"The claim of plaintiff is not that mere part performance of a contract for personal services which by its terms is not to be performed within a year, 'invalid' under our statute because not evidenced by writing, renders the same valid and enforceable. *Such a claim would, of course, find no support in the authorities.* . . . It was the change of position caused by his resignation from the Police Department upon which his claim wholly rests, and this resignation was, of course, no part of the performance of the contract of service. . . ." (Emphasis added, pp. 793-4.)

No other cases are relied upon by appellee.

Appellee does not in any wise attempt to support the trial Court's holding that the decision of this court in *E. K. Wood Lumber Co. v. Moore Mill and Lumber Co.*, 97 F. 2d 402, 409, is "not the law." or "goes too far." [R. 122.]

This case is discussed by appellee at pages 35-36 but nothing is said to justify or excuse the trial court's strictures.

Appellee also refers to this court's decision in *Georgia Peanut Co. v. Famo Products Co.*, 96 F. 2d 440, as requiring the seller to show "*some affirmative act*" on which he relied, and to the decision of this court in *Cincinnati Distributing Co. v. Sherwood & Sherwood Co.* (C. C. A. 9), 270 Fed. 82, which would require a plaintiff to show conduct of defendant, relying upon the statute, "such as to raise an equity *outside of and independent of the contract.*" But appellee makes no effort whatsoever to show that these requirements have been met in this case (p. 36).

No other cases are cited or discussed by appellee. The brief completely disregards the cases cited and discussed in appellant's brief, pages 24-30.

No reference is made to the case of *Booth v. A. Levy and J. Zentner Co.*, 21 Cal. App. 427, 431, which covers this case like a blanket. There the seller paid freight charges and when the buyer rejected, resold at a loss. (Appellant's Brief, p. 29.)

The court held the defendant was "not estopped to rely upon the Statute of Frauds," saying:

"It is a plain case where the seller chose to ship goods to a distant buyer who was bound by an oral agreement only. To hold that under such circumstances the buyer who refuses to accept the goods is estopped to rely upon the statute *would be to practically abrogate the Statute of Frauds.*" (Emphasis added.)

Here the freight and custom paid were necessary prerequisites to sale in any large American market. The price was correspondingly increased, in the absence of special circumstances not claimed to exist. Plaintiff sustained no loss by reason of expense of delivering to a metropolitan

market, which he would not have sustained in any event. This expense was no more of a loss or detriment than feeding or any other cost of preparing for market.

Attempts were made to sell these very cattle in Canada without success. It was deemed necessary to sell them in the United States and to incur the freight and customs duty incident thereto. Such expenses cannot be presumed to constitute actual loss, and there is no proof that they did. If appellee had accepted the cattle under the asserted contract, plaintiff would have incurred the identical expenditures. Therefore plaintiff's damage under the contract asserted, does not include these items but is limited to the difference between the market price and the asserted contract price.

It is significant that in the present case there is no finding of an oral contract which pre-existed this asserted performance by plaintiff. The complaint alleged such an oral contract but this contention was rejected by the Trial Court, who found only a continuing offer. This continuing offer was not taken out of the statute by plaintiff's performance, as was contended in the cases cited by plaintiff. There must first be an oral contract to take out of the statute. Here there was found to be none prior to performance. Therefore, it is the performance which appellee must contend both gives rise to the contract and takes that contract out of the statute. No case has been cited to support such contention. The contention cannot be reconciled with any cited in either brief.

If the holding of the Trial Court is permitted to stand nothing will be left of the Statute of Frauds. A seller will not even have to show an agreement on his part. There need be no agreement which the buyer himself could ever enforce. The seller merely ships to a particular con-

signee and that alone will ~~nullify~~ ^{justify} any contract which the seller wants to assert this consignee "offered" to enter into. The seller need show no contract, no writing, and no commitment on his part. He reserves a floating option to deliver or not to deliver. Of course, if the market drops, he delivers. In the meantime the buyer is powerless to protect himself, because he does not even know a contract or "continuing offer" will be asserted.

Certainly it was to preclude such enormous hazard to commercial life that the Statute of Frauds was enacted and perpetuated throughout our jurisdiction.

It is respectfully submitted that appellee has shown none of the elements essential to be shown to avoid the statute and that none exist. Also the record clearly shows that no judicial consideration was given to the legal principles applicable.

It is respectfully submitted that the judgment herein should be reversed.

BENJAMIN W. SHIPMAN,
Attorney for Appellant.

No. 12703.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACKING COMPANY,

Appellant,

vs.

CARIBOO LAND & CATTLE CO., LTD.,

Appellee.

PETITION OF APPELLANT UNION PACKING
COMPANY FOR REHEARING.

BENJAMIN W. SHIPMAN,

523 West Sixth Street,

Los Angeles 14, California,

Attorney for Appellant Union Packing Company.

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Appellee.

PETITION OF APPELLANT UNION PACKING COMPANY FOR REHEARING.

*To the Presiding Justice and Associate Justices of the
United States Court of Appeals for the Ninth Cir-
cuit:*

Defendant and Appellant, Union Packing Company, respectfully petitions for a rehearing of the decision herein affirming judgment for Plaintiff. The opinion was filed September 24, 1951, and is limited to about twenty-five lines, omitting any consideration whatsoever of the points advanced by Appellant for reversal of the decision of the Trial Court.

That the cryptic opinion of the Court is wholly unresponsive to the issues raised by the appeal is so obvious that in asking for a rehearing Appellant is virtually asking this Court to give some measure of consideration to these issues before permitting the judgment to become final by a rubber stamp affirmance. Unless a rehearing

is granted, a decision thoroughly erroneous in fact and law will have received the stamp of finality from this Court.

It is obvious also that to permit the decision to remain in its present form will result in the utmost confusion in an important phase of commercial law, which in the interest of public welfare must remain free from doubt.

The Holding of This Court.

While the actual holding of this Court is disguised by the refusal to set forth the facts or the issues, the Court has stated that:

I. The Trial Court under competent evidence found a firm contract;

II. The Court had found Plaintiff had expended large sums of money in the course of executing the contract, thus depriving Appellant of the benefit of the California statute of frauds;

III. There is nothing in the decision contrary to this Court's decision in *Wood Lumber Co. v. Moore Mill and Lumber Co.*, 97 F. 2d 402;

IV. There are some inconsistencies in the Findings of Fact and Conclusions of Law, but they do not require reversal.

These are the only statements made in the decision of this Court. Each statement is obviously inadvertent and erroneous under the record in this case and could not have been made upon even the slightest consideration of the points advanced by Appellant.

We realize that this Court is under a heavy pressure of work, but this work will not be lessened by an opinion

at once erroneous and misleading, which refuses to state the facts of the case or the legal principles applicable thereto.

Without rearguing the issues of this case, we wish to point out one by one that the statements made in the opinion of this Court, as above set forth, are irresponsible and incorrect.

I.

The Opinion Herein Is Erroneous in Stating That the Court Found a Firm Contract for the Purchase of Livestock or That There Was Competent Evidence Thereof.

The Trial Court's Conclusion "I" [R. 19] is that Appellant on September 8, 1948, and again on September 10, 1948, did "orally offer to purchase" the cattle, and by Conclusion "II" [R. 20] "plaintiff accepted the said offer by shipping 248 head of cattle from British Columbia, Canada, on September 29, 1948, consigned to them at Los Angeles, California."

The Trial Court also stated [R. 102] and at the conclusion of the trial [R. 123] that the evidence showed a continuing offer and not a firm contract. The same contention was repeatedly made in Appellee's brief (pp. 4, 14, 19, 37):

" . . . defendant had made a continuing offer to purchase approximately 250 head of cattle delivered in Los Angeles for a stated price and that the plaintiff had accepted such offer by delivering 248 head" (p. 4.)

"The delivery of these cattle in Los Angeles consigned to defendant constituted an acceptance of the offer and as a result a contract was created between the parties." (p. 14.)

“Accordingly, defendant having made a continuing offer to purchase from plaintiff for a stated price approximately 250 head of cattle to be delivered to it in Los Angeles and plaintiff having accepted such offer by so delivering 248 head, there was an agreement between the parties.” (p. 19; Rep. Br. p. 3.)

Therefore, for this Court to say that there was a finding that a firm contract was entered into prior to delivery of the cattle is not only totally erroneous but goes directly to the teeth of the findings of the Trial Court and Appellee’s entire theory of the case as asserted in its brief.

We have shown that there was no evidence of a continuing offer as found by the Trial Court, much less any evidence of a contract (Op. Br. pp. 9-18; Rep. Br. pp. 3-10); but whatever the state of the evidence, one thing is certain and that is that the Trial Court did not find, nor did Appellee contend in its brief, that there was a contract between the parties prior to delivery of the cattle in Los Angeles.

The statement of this Court that a firm contract was entered into is entirely unwarranted. This statement being the basis of the Court’s decision, it necessarily results that the decision is erroneous.

We are unable to understand how this Court can permit such a decision, so completely at variance with the actual facts, with the findings of the Trial Court and with Appellee’s own contentions, to become final without further consideration. In fact, the situation presented by the record in this case is such as to demand the profoundest study of the facts and decision of the Trial Court by this Court to determine whether such decision is correct.

In the first place, the Trial Court himself stated in referring to his difficulty in evolving a contract of any sort whatsoever:

“This is probably the *closest* case I have had to decide since I have been on the bench.” [R. 123.]

Certainly such a contentious and indeterminate “contract” should not be enforced in disregard of the Statute of Frauds.

Again, the Trial Court recognized that the legal principles applicable were very difficult and that instead of making a further study, he would go ahead and rule and permit the matter to be determined by this Court on appeal, saying:

“If I am wrong on the law, *you have your remedy of appeal.*” [R. 128.]

And the Trial Court himself invited review of his decision by stating with respect to the case of *Wood Lumber Co. v. Moore Mill and Lumber Co.*, decided by this Court, 97 F. 2d 920:

“With all due respect to my superior, Judge Stephens, *I do not think that is the law. I think that goes too far.*” [R. 122.]

When this Court fully and unreservedly approves a decision of the Trial Court arrived at in this fashion, it has effectually precluded all possibility of Plaintiff obtaining a fair trial or of justice being done between the parties to this case.

II.

The Opinion Herein Is Erroneous in Stating That the Expenditure of Large Sums of Money in the Course of Executing the Contract Deprived Appellant of the Benefit of the Statute of Frauds.

This statement is not only erroneous but it is a complete *non sequitur*. The error of this statement merely accentuates the error of the opening statement of the opinion. (Point I, *supra*.)

The Trial Court found, and the Appellee contended throughout its brief, that there was a continuing offer which became a contract when the cattle was delivered to Appellant in Los Angeles. This means there was *no contract prior to that time*. Also, the expenditures referred to as having been incurred by Appellee were all incurred prior to delivery in Los Angeles and consisted of custom duties and freight charges. Custom duties were paid when the cattle were brought across the border from British Columbia to the United States. The freight charges were incurred in shipping the cattle from Canada to Los Angeles, according to the Trial Court. [R. 13.]

These freight charges and custom duties were necessary to be paid on any shipment to any American market. There is no finding whatsoever that Plaintiff was damaged by this amount or any other amount. Presumably, the sales value of the cattle was enhanced by these expenditures just as by expenditures for feeding.

These expenditures were *not* “in the course of executing the contract,” as this Court holds; for the Trial Court has found, and Appellee contends, that the contract consisted of Appellant’s continuing offer which was accepted by delivery to Defendant in Los Angeles. [R. 19; Rep. Br. p. 3; Point I, *supra*.]

It is untrue that the expenditures were incurred “in the course of executing the contract,” as this Court states, for there was no contract until acceptance of the continuing offer by delivery in Los Angeles; but *the California courts have expressly held that such expenditures are not sufficient under the Statute of Frauds.*

This Court has, in effect, overruled the case of *Booth v. A. Levy & J. Zentner Co.*, 21 Cal. App. 427, 431, a case which has not been questioned in the California courts. That decision holds that payment of freight charges by seller is entirely insufficient as a matter of law to take an oral contract out of the statute, saying:

“It is a plain case where the seller chose to ship goods to a distant buyer who was bound by an oral agreement only. To hold that under such circumstances the buyer who refuses to accept the goods is estopped to rely upon the statute would be to practically abrogate the statute of frauds.” (P. 431; emphasis added.)

If the Court is going to overrule this decision or refuse to follow it, it is submitted it is the duty of this Court to say so; and if there is any differentiation between the freight charges in this case and the payment of freight

charges in that case, the Court should say so. Otherwise incalculable confusion is inevitable.

Appellant has contended that the rule in the *Booth case* requires reversal of the decision of the Trial Court. If the rule of that case is not to be followed, it becomes the duty of this Court to say in what respect the principle of that decision is to be departed from. This Court is just as much bound by the rule in the *Booth case* as it is by a decision of the United States Supreme Court unless the case can be differentiated in legal principle, which up to now this Court has not attempted to do.

But even aside from the *Booth case*, it is uniformly held, contrary to the statement of this Court in its decision herein, *that the mere incurring of expenditures is insufficient* to relieve from the Statute of Frauds.

Even in the case of *Seymour v. Oelrichs*, 156 Cal. 782, cited by the Court herein, the California court states that acts of performance of a contract are not sufficient to take the same out of the Statute of Frauds.

“The claim of plaintiff is *not that mere part performance of a contract* for personal services which by its terms is not to be performed within a year, ‘invalid’ under our statute because not evidenced by writing, renders the same valid and enforceable. *Such a claim would, of course, find no support in the authorities . . .* It was the change of position caused by his resignation from the Police Department upon which his claim wholly rests, and this resignation was, of course, *no part of the performance of the contract of service . . .*” (Emphasis added; pp. 793-4; Rep. Br. p. 15.)

III.

The Opinion Herein Is Erroneous in Holding That There Is Nothing in the Decision Contrary to This Court's Decision in *Wood Lumber Co. v. Moore Mill and Lumber Co.*, 97 F. 2d 402.

In making this statement the Court itself is inadvertently overruling its own prior decision. This Court said in the *Wood case*:

“Appellant argues that appellee is estopped to assert that the agent had no written authority. We see no reason for applying a different rule in respect to this contention than that applicable where estoppel is claimed with respect to the statute of frauds proper. In the latter case *it is necessary to show* not only a change of position to the injury of the party asserting the estoppel, *but also that there has been conduct on the part of the opposite party amounting to a representation that he will not avail himself on the statute to escape his agreement.* In *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154, the case most strongly relied upon by appellant, there was a definite promise to give a written contract, which promise was never performed. The court in holding that there was an estoppel to assert the statute quoted from 5 Brown on Statute of Frauds, §457a, as follows: ‘A plaintiff . . . must be able to show clearly . . . not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance . . .’ (Page 795, 106 P. page 94.)” (P. 409; emphasis added; Op. Br. p. 21.)

This decision, therefore, holds that mere expenditures on the part of the party asserting the estoppel, assuming that they amount to injury, are *not sufficient* to take the case out of the statute, but there must be something in the nature of a representation by the opposite party that he will not avail himself of the statute. This is the same principle announced in the case of *Seymour v. Oelrichs, supra*. But that principle is entirely overlooked by the Court in this decision, as it was by the Trial Court when it assumed that the mere incurring of expenditures removed any question of the Statute of Frauds.

That is not the law and has never been announced as a principle of decision by any court prior to the decision of this Court in the present case.

The fact that this Court could now state such a confusing principle of law, first, that expenditures in the course of executing the contract removed the bar of the Statute of Frauds, and, second, that this rule is in accordance with this Court's decision in the *Wood Lumber Co. case*, demonstrates beyond question that this Court has not had the benefit of a study of the applicable decision, including its own decision in the *Wood Lumber Co. case*.

If that case is to be overruled, it is submitted it should be done expressly and not by indirection or inadvertence. If it is no longer true that sustaining of injury by the opposite party in itself is insufficient to remove the bar of the statute, then this Court should say so in unmis-

takable terms and should not leave this feature of commercial law in a state of utmost confusion.

To ignore the defense of the Statute of Frauds in this case, as the Trial Court has done and as this Court has condoned, is to render the Statute entirely nugatory. All that a seller has to do to void the Statute is to ship goods to a "purchaser" and then assert an oral contract, the very situation which the Act was intended to preclude.

This alarming feature of the present decision of this Court, fraught with the most far-reaching consequences to commercial life, must be considered in the light of the clear statement of the Trial Court himself, in rendering his decision herein, with respect to the *Wood Lumber Co. case* when he expressly refused to follow that decision, stating:

"With all due respect to my superior, Judge Stephens. *I do not think that is the law. I think that goes too far.*" [R. 122.]

This statement of the Trial Court shows beyond controversy that his own decision in his own mind was irreconcilable with the rule of the *Wood Lumber Co. case*.

When this Court says that there is nothing in the Trial Court's decision contrary to the *Wood Lumber Co. case*, it is either making an incorrect statement or it is declaring that the Trial Court did not know what he was doing. There is no other alternative. In either case Appellant was deprived of a fair trial.

IV.

**The Opinion Herein Is Erroneous in Holding That
There Are Some Inconsistencies in the Findings
of Fact and Conclusions of Law That They Do
Not Require Reversal.**

This Court states that detailed recitation of the facts would be of little or no assistance to anyone. This is not true as the decision is necessarily an important precedent and the decision is also subject to review by a higher court.

This Court states that there are some inconsistencies in the Findings of Fact and Conclusions of Law; but there is no mention of Appellant's contention that the Trial Court was required to make findings of fact on all material issues necessary to support the judgment [R. 52] and that the findings do not support the judgment. (Op. Br. pp. 31-34.)

There was no finding that there were any expenditures incurred "in the course of executing the contract," as this Court says. Rather the finding is that the expenditures anteceded the contract. (Point III, *supra*.)

There is no finding that Plaintiff suffered damage in the amount of his expenditures or any other amount, and the presumption is to the contrary as on any shipment to this country these charges would have had to be paid and they would have resulted in a more favorable market. The ultimate receipts presumably were increased in the amount of the expenditures in sending the cattle to a large market. The findings, therefore, contained no basis for the theory of promissory estoppel espoused by the Trial Court in defiance of the decisions of this Court.

It is fundamental that:

“Findings based on the evidence must embrace the basic facts which are needed to sustain the order.”

Morgan v. United States, 298 U. S. 468, 480, 80 L. Ed. 1288, 1295.

There are no such findings. Nor does this Court even assume such findings in its decision which is simply a rubber stamp affirmance.

The result is that the actual holding of the Court herein cannot fail to give rise to the utmost confusion.

What becomes of the holding in the *Booth case*, 21 Cal. App. 427, that the seller's payment of freight charges cannot be regarded as sufficient to take an oral contract out of the Statute of Frauds and that such a holding would abrogate the statute itself?

What becomes of the holding of this Court in the *Wood case*, 97 F. 2d 920, that in addition to injury of the party asserting estoppel, the opposite party must have represented by words or conduct that he would not avail himself of the Statute? Especially in view of the Trial Court's statement that

“I do not think that is the law. I think that goes too far.”

The Trial Court realized full well that under the facts of this record to follow the decision of this Court in the *Wood case*, would require judgment for defendant. He deliberately refused to follow this Court's rule.

By its rubber stamp affirmance of such defiance, and its failure to face and directly pass upon the issues presented by this appeal, this Court has not only approved a

miscarriage of justice, but has denied Appellant the benefit of the review to which it is entitled by statute, and has created a quagmire of confusion in our commercial law.

It is respectfully submitted that for the reasons advanced herein and in the briefs already on file, the decision herein should be vacated and the judgment of the Trial Court reversed.

Respectfully submitted,

BENJAMIN W. SHIPMAN,
Attorney for Appellant Union Packing Company.

Certificate of Attorney.

I, Benjamin W. Shipman, attorney for Appellant herein, hereby certify that in my opinion the Petition for Rehearing is well founded and, further, that said Petition is not interposed for delay.

BENJAMIN W. SHIPMAN,
Attorney for Appellant Union Packing Company.

No. 12706

United States
Court of Appeals
for the Ninth Circuit.

JOSHUA HENDY CORPORATION, a Corpora-
tion, Sued Herein as Pacific Tankers, Inc., a
Corporation,

Appellant,

vs.

OTTO GEORGE CLAVEL,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

JAN 22 1951

PAUL P. O'BRIEN,

CLERK



No. 12706

United States
Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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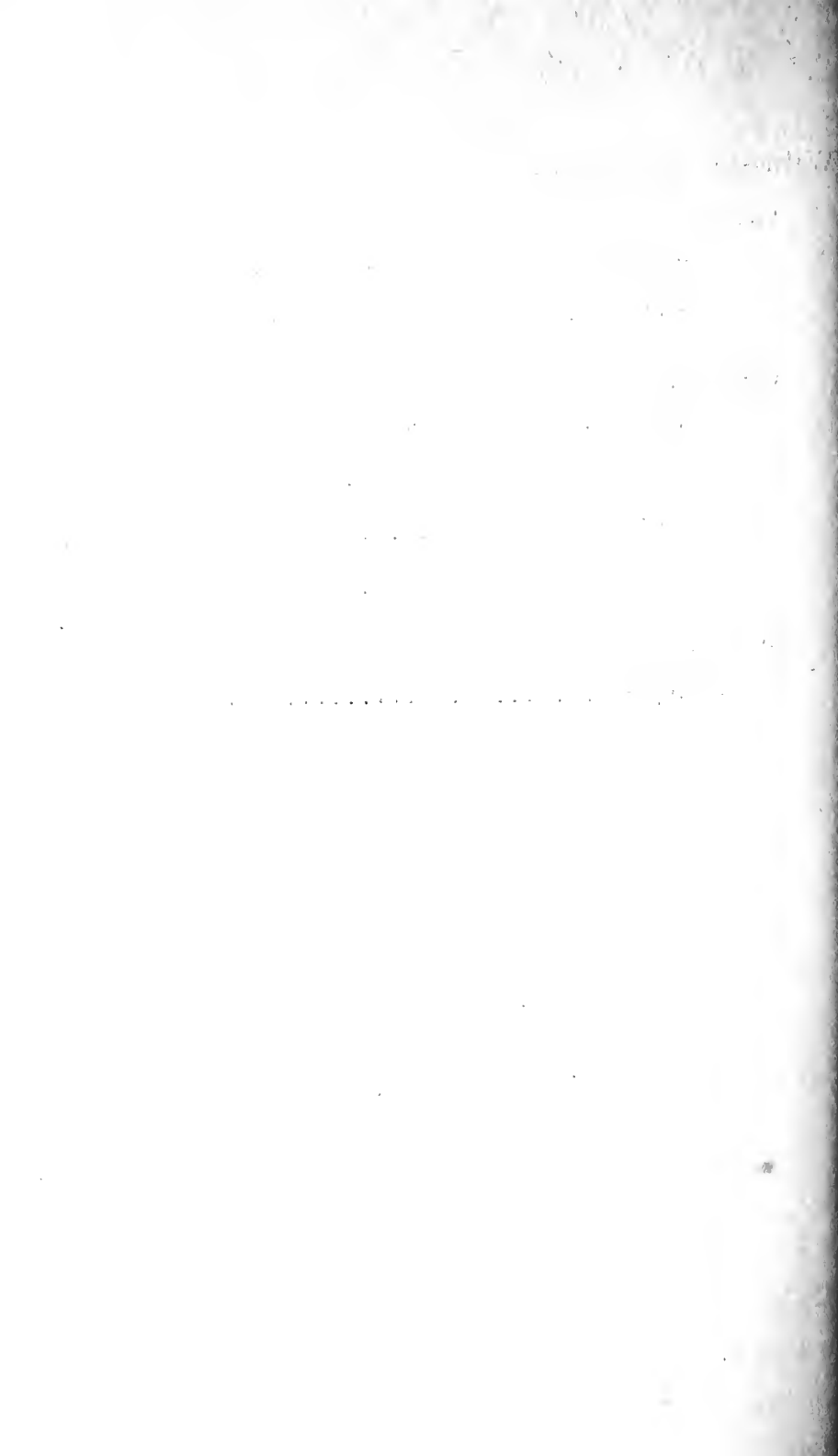
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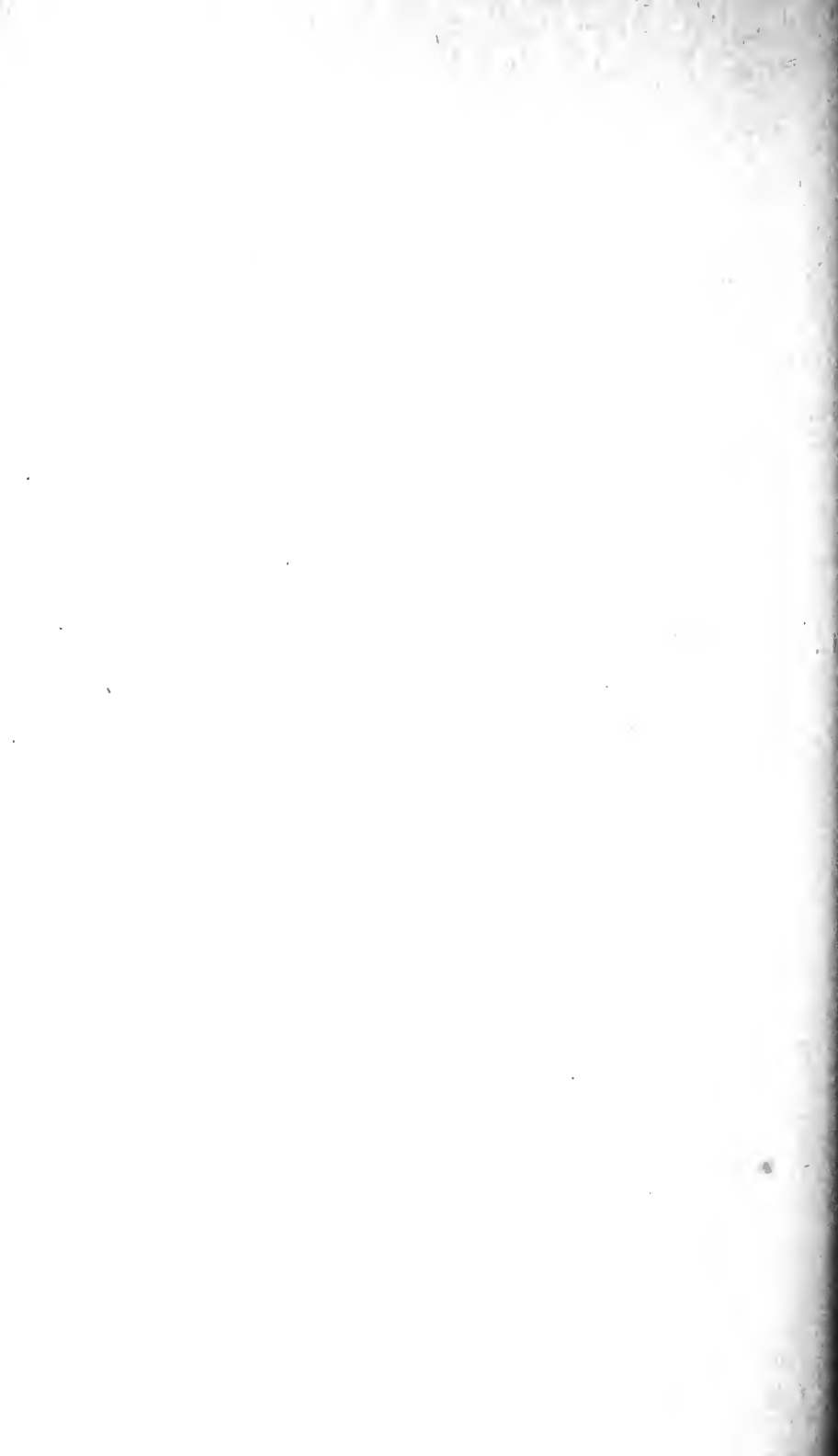
233 Sansome Street,
San Francisco California,

Proctors for Respondent and Appellant.

L. CHARLES GAY,

311 California Street,
San Francisco, California,

Proctor for Libelant and Appellee.



In the United States District Court, in and for
the Northern District of California, Southern
Division

In Admiralty, No. 25319-G

OTTO GEORGE CLAVEL,

Libelant,

vs.

PACIFIC TANKERS, INC., a Corporation,
UNITED STATES OF AMERICA, and Black
Company,

Respondents.

LIBEL BY SEAMAN FOR DAMAGES
FOR INJURIES

Filed Under Provisions of 28 U. S. C., Sec. 837.

To the Honorable, the Judges of the United States
District Court for the Northern District of
California, Southern Division:

The libel of Otto George Clavel, in a cause of tort
for damages for personal injuries, civil and mari-
time, alleges:

I.

That the true name of the respondent sued herein
under the fictitious name "Black Company" is now
unknown to libelant, and libelant prays that when
its true name has been ascertained the same may
be inserted herein by appropriate amendment.

II.

That respondent Pacific Tankers, Inc., is a cor-

poration having its principal office and place of business in the City and County of San Francisco, State of California.

III.

That libelant is a resident of the County of Marin, within the Northern District of California.

IV.

That at all times mentioned herein respondents were the owners of the American Tanker "Pecos," and that at all of said times the said vessel was being operated for the United States of America by respondents Pacific Tankers, Inc., and Black Company, as a public vessel of the United States of America.

That the said vessel is now, or during the pendency of this action will be, within the territorial jurisdiction of the United States and of this Honorable Court.

V.

That at all times mentioned herein libelant was employed by the respondents as a member of the crew, to wit, boatswain, of the said tanker "Pecos." That on or about April 22, 1948, in the course of his employment on the vessel, libelant suffered an injury when he scratched the index finger of his right hand. That he cleaned the cut or scratch, but two days later the finger began to swell and became very painful. That libelant reported the injury to the mate, who gave him epsom salts for treating the finger, but it failed to respond to treatment and continued to swell and became discolored. That the

mate of the vessel thereupon undertook to treat libelant's injured finger, and in the course of treating same made a deep incision in the finger. That the master of the ship also gave the finger treatment, and squeezed it in an attempt to discharge pus. That the treatment by the mate and the master was not beneficial, but on the contrary made the injury worse. That libelant required and expressly requested the master and mate to provide him with adequate skilled medical treatment, but none was provided until the vessel arrived at Yokosuka, Japan. That by that time the finger was in such condition that treatment was unavailing to save it.

That libelant returned to the United States on the vessel, and was discharged at Los Angeles on May 24, 1948, and that he came to San Francisco for further treatment.

That it has been necessary to amputate libelant's index finger at the second joint, that the remaining portion of the finger is still sensitive, and that the movement of the second and third fingers of his right hand has been impaired. On information and belief, alleges that said injuries are permanent in nature.

VI.

That the said injuries proximately resulted from the negligence and carelessness of respondents and their officers and employees in failing to provide libelant with proper treatment and medication, and from the negligence of the respondents' officers in the treatment of libelant's injuries, as aforesaid.

VII.

That by reason of the premises libelant has suffered damages through loss of earnings in the amount of \$2,000.00, to date, and has been generally damaged in the sum of \$20,000.00.

VIII.

That this action is brought under the provisions of Title 46, United States Code, sec. 781, known as the Public Vessels Act, and related sections, and Title 46, U. S. Code, sec. 688, known as the Jones Act.

IX.

That all and singular the premises are true, and within the admiralty jurisdiction of the United States, and of this Honorable Court.

Wherefore, libelant prays that respondents may be required to appear and answer all and singular the matters aforesaid, and that libelant may have a decree for the amount of his damages, with costs, and that libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

/s/ L. CHAS. GAY,

Proctor for Libelant.

State of California,
City and County of San Francisco—ss.

L. Chas. Gay, being first duly sworn, deposes and says: that he is proctor for the libelant in the foregoing action; that said libelant is now outside the

City and County of San Francisco, where affiant maintains his office, and that affiant makes this verification on behalf of libelant, upon information received from libelant; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein alleged on information and belief, and as to such matters he believes it to be true.

/s/ L. CHAS. GAY.

Subscribed and sworn to before me this 19th day of November, 1948.

[Seal] /s/ LAURA L. MacHUGH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires January 15, 1952.

[Endorsed]: Filed November 24, 1948.

[Title of District Court and Cause.]

ANSWER TO LIBEL

Comes now Pacific Tankers, Inc., a corporation,
and answering the Libel herein, alleges:

I.

The allegations of Article I require no answer.

II.

Admits the allegations of Article II.

III.

Respondent has no information or belief concern-

ing the allegations of Article III, and demands strict proof thereof.

IV.

Answering the allegations of Article IV respondent alleges that the United States of America is the owner of the USNT "Pecos" and that said vessel was operated, managed and controlled pursuant to the provisions of a written contract between respondent, Pacific Tankers, Inc., and the United States Navy, and not otherwise, and with these exceptions respondent denies the allegations of Article IV.

V.

Answering the allegations of Article V, respondent alleges that libelant was employed as a Bosun on the USNT "Pecos," and further alleges that on or about April 24, 1948, said libelant sustained a laceration to the fourth finger of his right hand while employed in his duties on said vessel, and save and except as hereinabove alleged and admitted denies the allegations of Article V.

VI.

Denies each and every, all and singular, all of the allegations contained in Article VI.

VII.

Denies each and every, all and singular, all of the allegations contained in Article VII.

VIII.

Answering the allegations contained in Article VIII respondent leaves all questions of jurisdiction

to the above entitled Court and denies that said action is brought within the provisions of the Public Vessels Act.

IX.

Answering the allegations of Article IX, respondent leaves open all questions of jurisdiction to the above entitled Court.

As and for a Second, Separate and Distinct Answer and Defense to Said Libel, respondent alleges that said libelant was guilty of carelessness and negligence in and about the matters and things set forth in said libel, in this, to wit: That at the time and place of the event mentioned in this libel, said plaintiff failed to use due care or caution for his own safety and protection, in that said libelant failed to report his said injury within a reasonable time to allow the proper persons aboard the said USNT "Pecos" to administer aid to him, so that any and all of the injuries or damages claimed to have been sustained by said libelant were solely and proximately caused and contributed to by his own carelessness and negligence in the premises.

Wherefore, respondent, Pacific Tankers, Inc., prays that libelant take nothing by his said libel and that respondent have its costs of suit herein incurred.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Proctors for Respondent, Pacific Tankers, Inc., a Corporation.

State of California,
City and County of San Francisco—ss.

H. E. Hedrick, being first duly sworn, deposes and says:

That he is an officer of Pacific Tankers, Inc., a corporation; to wit, Asst. Secretary-Treasurer; that as such officer he is empowered to make this verification; that he has read the foregoing Answer to Libel and knows the contents thereof and that the same is true and correct of his own knowledge, except as to those matters therein stated on information and belief, and as to those he believes it to be true.

/s/ H. E. HEDRICK.

Subscribed and sworn to before me this 10th day of January, 1949.

[Seal] /s/ LAURA L. MacHUGH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires January 15, 1952.

[Endorsed]: Filed January 17, 1949.

[Title of District Court and Cause.]

ANSWER OF UNITED STATES OF AMERICA

Comes now respondent, United States of America,
and answering the libel herein, alleges:

I.

The allegations contained in Article I require no
answer.

II.

Admits the allegations of Article II.

III.

Respondent has no information or belief concern-
ing the allegations of Article III and demands strict
proof thereof.

IV.

Answering the allegations of Article IV, respond-
ent alleges that the Tankship Pecos was owned by
the United States of America and that said vessel
was operated and managed pursuant and according
to the terms and conditions of a certain written
contract entered into between the United States
Navy and respondent, Pacific Tankers, Inc., and not
otherwise, and save and except as herein admitted
and alleged, denies the allegations of Article IV.

V.

Denies the allegations contained in Article V.

VI.

Denies the allegations contained in Article VI.

VII.

Denies the allegations contained in Article VII.

VIII.

Answering the allegations of Article VIII, respondent leaves open all questions of jurisdiction to the above entitled court.

IX.

Answering the allegations of Article IX respondent leaves open all questions of jurisdiction to the above entitled court.

As and for a Second, Separate, Distinct Answer and Defense to Said Libel, this respondent is informed and believes and therefore alleges upon information and belief that said libelant was guilty of carelessness and negligence in and about matters and things set forth in said libel in this, to wit: that at the time and place of the event mentioned in said libel, said libelant failed to use due or any care or caution for his own safety or protection in that said libelant failed to report his said injury within a reasonable time after the occurrence of the same in order to allow the proper persons aboard the Tankship Pecos to administer aid to him so that any and all injuries or damages claimed to have been sustained by said libelant were solely and proximately caused and contributed to by his own carelessness and negligence in the premises.

Wherefore, respondent, United States of America,

prays that said libel herein be dismissed together with costs of suit.

FRANK J. HENNESSY,
United States Attorney.

By /s/ C. ELMER COLLETT,
Assistant United States
Attorney.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,
Proctors of Counsel for United
States of America.

[Endorsed]: Filed February 8, 1949.

District Court of the United States, Northern
District of California, Northern Division

As a Stated Term of the District Court of the United States for the Northern District of California, Northern Division, held at the Court Room thereof, in the City of Sacramento, on Monday, the 24th day of April, in the year of our Lord one thousand nine hundred and fifty.

No. 25319

OTTO GEORGE CLAVEL

vs.

PACIFIC TANKERS, INC., UNITED STATES
OF AMERICA, et al.

Present: The Honorable Dal M. Lemmon,
District Judge.

ORDER ENTERING DECREE FOR \$7,000.00
IN FAVOR OF LIBELANT

This case having been heretofore tried and submitted on briefs, It Is Ordered that a decree be entered in favor of the libelant for the sum of Seven Thousand Dollars (\$7,000.00), findings of fact and conclusions of law to be submitted in accordance with the Rules of Practice of this Court.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be heard before the Court in Admiralty on March 22, 1950. Libelant was present in person and represented by his proctor, L. Charles Gay, Esq., and the respondents were represented by their proctors, John H. Black and Edward R. Kay, by Henry W. Schaldach, Esq.; it having been stipulated by the parties in open court that the operator of the vessel involved in the action was Pacific Tankers Division of Joshua Hendy Corp. and that United States of America was not the employer of the libelant, and the action having been by stipulation dismissed as to the United States of America. Thereupon oral and documentary evidence was submitted by and on behalf of the parties to the cause and at the conclusion of all of the testimony the parties rested and the cause was submitted to the Court for its consideration and decision, and the Court having fully considered all of the evidence introduced and the briefs filed on behalf of the respective parties and being fully advised in the premises, now makes and orders entered and filed these its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I.

That on April 23, 1948, respondent Pacific Tankers Division of Joshua Hendy Corp. was the oper-

ator of the American Tanker "Pecos," and that on said day, and thereafter, libelant was employed by said respondent as a member of the crew, to wit boatswain, of said vessel.

II.

That on or about April 23, 1948, libelant, in the course of his employment on the vessel, suffered an injury when he scratched the index finger of his right hand. That libelant cleaned the wound and applied band-aids thereto. That on the second day after the injury the injured finger was swollen and painful and showed evidence of infection. That libelant reported his injury to the Mate of the vessel and stated that he was unable to work, and the Mate permitted him to knock off work, instructing him to come for medical care if the finger did not improve. That on April 25, 1948, the finger was swollen and painful and the swelling extended into libelant's right hand, and that the swelling became more pronounced and eventually extended into the right arm. That the swollen hand became discolored turning blue, green and yellow. That libelant suffered pain from the injury, and had a fever. That on April 25, 1948, libelant reported to the Master of the vessel for medical care. That libelant asked to be given penicillin, and the Master replied that he had none; libelant asked to be put ashore for hospitalization at Manila, and the Captain replied that he could not, or would not do so; that libelant then requested the Captain to radio for medical advice, and the Captain replied that that was un-

necessary. That libelant remained on the vessel until its arrival at Yokosuka, Japan, on May 3, 1948. That he was taken to a hospital in Yokosuka on May 4, 1948. That at said time the finger was still infected and the hand swollen. That libelant received penicillin and sulfa at the hospital, but the finger had then developed a "crook" and the attending physician informed libelant that it would be necessary to remove the entire finger. That libelant declined to submit to the amputation, and with the consent and approval of the doctor rejoined the "Pecos" and returned to the United States. That libelant was paid off the ship on or about May 24, 1948, and took a plane to San Francisco, and entered the Marine Hospital the following day. That at the Marine Hospital libelant was given a course of penicillin treatments, and on or about August 15, 1948, his index finger was amputated at the second joint. That thereafter the stub of the finger remained sensitive to pressure, and libelant suffers pain, particularly in cold weather. That because of the degree of infection and the interstitial scar and fibrosis secondary to the infection libelant has a stiffness and limitation of the right middle finger. That his grip in his right hand is reduced approximately 35%. That libelant was disabled from work by reason of the injuries until about February 1, 1949. That he then returned to work and performed his regular duties until December, 1949, when he was compelled to stop work by reason of the pain in his hand induced by cold weather. That he had

not resumed work on the day of the trial on March 22, 1950.

III.

That on April 25, 1948, when libelant reported for treatment it was apparent that his finger and hand were infected, and that the condition became worse. That the Mate of the vessel treated the injury by furnishing Epsom Salts and causing libelant to soak the hand in hot Epsom Salts solution, and that when the swelling progressed the Mate applied a "drawing salve" to the finger. That on April 27, 1948, the Mate made an incision in libelant's index finger for the purpose of removing pus therefrom, and thereafter removed water and pus from the back of libelant's hand. That the recognized and customary treatment for the condition was a course of penicillin and/or sulfa treatments. That had libelant received the said usual and necessary treatment the infection could have been controlled and eliminated without any permanent ill effects. That libelant's injury and need for treatment were obvious, and the proper treatment thereof was known to the officers of the vessel.

IV.

That respondent negligently failed to provide the vessel with an adequate medicine chest, and negligently failed to provide the vessel with a reasonably sufficient supply of penicillin and sulfa drugs. That the respondent negligently failed to replenish the medicine chest at ports of call, or by contacting other vessels. That the vessel was traversing a busy trade

route and could and should have contacted other vessels in the vicinity. That respondent negligently failed to administer the appropriate medicines, to wit, penicillin and sulfa drugs, if in fact there were any on board the ship. That respondent negligently failed to avail itself of medical advice available by means of a radio service for the purpose. That on April 27, 1948, when libelant's condition was serious, and when his hand was lanced by the Mate, the vessel was less than a day's run from Manila, and that respondent negligently failed to put in at Manila, and negligently failed to hospitalize libelant as requested. That libelant's condition was the proximate result of improper and inadequate medical care, as aforesaid.

V.

That at the time of his injury libelant was earning approximately \$400 per month. That he was disabled for the period stated above, and suffered physical and mental pain. That he has permanent injuries as above stated which handicap him in his occupation, and is entitled to compensation therefor, as well as for cosmetic considerations. That the issue of maintenance was not submitted to the court, either by pleadings or evidence, and the issue was reserved. That plaintiff has been damaged in the amount of \$7,000.

VI.

That libelant was not contributorily negligent in respect of care of his injured hand, but on the contrary demanded adequate treatment and cared for

his injury as well as possible under the circumstances under which he found himself.

From the foregoing facts the Court draws the following

Conclusions of Law

I.

That the Court has jurisdiction hereof.

II.

That respondent negligently failed to provide libelant with usual and adequate medical care following his injury suffered in the course of respondent's employment, and that by reason thereof libelant suffered damages in the amount of \$7,000.

III.

That a decree should be entered herein in favor of the libelant, Otto George Clavel, and against respondent Pacific Tankers Division of Joshua Hendy Corp. in the amount of \$7,000, with costs of suit.

Let decree be entered accordingly.

Done and dated at Sacramento, California, this 22nd day of June, 1950.

/s/ DAL M. LEMMON,

Judge of the United States
District Court.

Receipt of copy acknowledged.

Lodged May 2, 1950.

[Endorsed]: Filed June 22, 1950.

In the United States District Court, Northern
District of California, Southern Division

No. 25319—In Admiralty

OTTO GEORGE CLAVEL,

Libelant,

vs.

PACIFIC TANKERS DIVISION OF JOSHUA
HENDY CORP., a Corporation,

Respondent.

FINAL DECREE

This cause having come on to be heard in its regular order on March 22, 1950, upon pleadings and proofs, and having been briefed and submitted by proctors for the respective parties, and the Court, after due deliberation, having on April 24, 1950, ordered decree in favor of libelant in the amount of \$7,000.00, and having filed its Findings of Fact and Conclusions of Law, and ordered that a decree be entered accordingly, it is hereby

Ordered, Adjudged and Decreed, that the libelant recover of and from the respondent Pacific Tankers Division of Joshua Hendy Corp. the sum of \$7,000.00, together with libelant's costs taxed in the sum of \$....., with interest on said sums until paid, and that the libelant have execution against respondent and its stipulators therefor.

Dated: June 22nd, 1950.

/s/ DAL M. LEMMON,

Judge of the District Court.

Receipt of copy acknowledged.

Lodged May 2, 1950.

Entered June 23, 1950.

[Endorsed]: Filed June 22, 1950.

[Title of District Court and Cause.]

PROPOSED COUNTER FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Comes now the respondent herein and proposes the following Counter Findings to the Proposed Findings of Fact and Conclusions of Law heretofore submitted by libelant.

As to the Findings of Fact:

I.

That Paragraph II of the Proposed Findings of Fact be amended beginning with the word "That" on line 22 of page 2 thereof, to and including the end of said Paragraph II, as follows:

That the Master and Medical Officer aboard, rendered libelant the customary and recognized treatment for an infected finger by soaking said libelant's finger in Epsom Salt solution, and that it was not necessary to radio for medical advice because there was no other treatment available aboard said vessel

that could have been given to said libelant. That the libelant did not request the Captain or First Mate of the said vessel to radio for medical advice, nor did the libelant request that he be put ashore during any of the period of time between the Straits of Singapore and the coast of Japan while the vessel was en route to Japan. That there was no penicillin or sulfa in the said medicine chest due to the fact that members of the crew had been receiving penicillin and sulfa treatments for venereal diseases which the medical officers were treating, and that said supplies were exhausted at the time that libelant's finger became infected. That on May 3, 1948, the libelant was taken to the Naval Hospital at Yokosuka, Japan, where he was given penicillin treatment and that thereafter requested that he be allowed to return to the vessel to complete the voyage, which he did. That the index finger of libelant was amputated at the second joint on or about August 15, 1948, and he has a reduction of grip of approximately 35%. That libelant returned to work on or about February, 1949, and worked for an entire year and his index finger at the present time is not such that he cannot work because of the condition he complains of.

II.

That Paragraph III of the Findings of Fact be amended to read as follows:

That on or about April 25, 1948, when libelant reported to the First Mate that he had an infection, he was given the recognized treatment for infections

by the Mate who furnished Epsom Salts and hot water and that thereafter the finger was incised and pus removed therefrom. That libelant thereafter continued the recognized treatment for infections, that is, the soaking of his finger and hand in hot Epsom Salt solution. That there was no penicillin or sulfa aboard the vessel at the time that libelant's finger became infected due to the fact that the supplies had been depleted by use by the Medical Officer for treatment of venereal diseases aboard said vessel.

III.

That Paragraph IV of the Findings of Fact be amended as follows:

That the respondent was not negligent in failing to provide penicillin and sulfa drugs, and the fact that the supply of penicillin and sulfa was exhausted does not constitute negligence on the part of respondent. That the officers aboard said vessel afforded libelant the recognized and proper treatment for infections during the time that his finger was infected aboard said vessel and that even if the Master had radioed for medical advice, such advice would not have been other than what the said officers were then tendering said libelant. That the condition of libelant's finger was not the result of improper and inadequate medical care.

IV.

That Paragraph V of the Findings of Fact be amended as follows:

That said libelant was earning approximately

\$250.00 per month base pay and \$150.00 a month overtime and that libelant has not been damaged in the sum of \$7,000.00 or in any other sum or sums, or otherwise, or at all.

V.

That Paragraph VI of the Findings of Fact be amended as follows:

That said libelant was tendered and given the recognized medical treatment for an infected finger while aboard said vessel.

As to the Conclusions of Law:

I.

That Paragraph II of the Conclusions of Law be amended as follows:

That respondent gave and tendered libelant with the usual and recognized medical treatment for an infected finger while aboard said vessel and that such treatment was the recognized treatment for infections of the nature that libelant was suffering from while aboard the "Pecos" and that libelant has not been damaged in any other sum or sums, or otherwise, or at all.

II.

That Paragraph III of the Conclusions of Law should be amended as follows:

That Decree be entered in favor of respondent

and against libelant in that libelant take nothing by his said libel and that the said libel be dismissed.

Dated: May 3, 1950.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Proctors for Pacific
Tankers, Inc.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

STIPULATION FOR AMENDMENT OF DECREE

It is stipulated by and between the parties hereto, through their respective proctors, that the Final Decree heretofore entered herein shall be deemed amended in the following respects: Wherever the words "Pacific Tankers Division of Joshua Hendy Corporation" or "Pacific Tankers, Inc.," appear, either in the pleadings or in the title or body of said final decree, the words Joshua Hendy Corporation shall be substituted therefor, and upon filing of this stipulation the decree shall be deemed amended accordingly.

Dated: July 21st, 1950.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Proctors for Respondent.

/s/ L. CHAS. GAY,
Proctor for Libellant.

It is so ordered July 21st, 1950.

/s/ DAL M. LEMMON,
Judge of the District Court.

[Endorsed]: Filed July 21, 1950.

[Title of District Court and Cause.]

PETITION FOR APPEAL AND ALLOWANCE
THEREOF

Comes now the respondent herein, Joshua Hendy Corporation, a corporation, heretofore sued as Pacific Tankers, Inc., and being aggrieved by the Final Decree made and entered herein on the 23rd day of June, 1950, by the above-entitled Court, does hereby claim an appeal from said Final Decree and from said Order to the United States Court of Appeals for the Ninth Circuit, and prays that their said appeal may be allowed.

Respondent further prays leave to prosecute this appeal by furnishing a good and sufficient supersedeas bond to secure payment of all damages, costs and fees, said supersedeas bond to be in the amount of \$9,000.00.

Dated: July 21, 1950.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Proctors for Respondent and
Appellant.

Order Allowing Appeal

The within appeal is allowed and the supersedeas bond is hereby approved.

Done in open Court this 20th day of July, 1950

/s/ LOUIS GOODMAN,

Judge of the United States
District Court.

[Endorsed]: Filed July 21, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Otto George Clavel, Libellant Herein, and to
L. Chas. Gay, His Proctor:

Notice Is Hereby Given that Joshua Hendy Corporation, a corporation, sued herein as Pacific Tankers, Inc., the respondent above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order made and entered by the above-entitled Court on April 24, 1950, and from the Final Decree made and entered by this Court on June 23, 1950.

Dated: July 21, 1950.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Proctors for Respondent and
Appellant.

[Endorsed]: Filed July 21, 1950.

[Title of District Court and Cause.]

APOSTLES ON APPEAL AND PRAECIPE
THEREFOR

To L. Chas. Gay, Esq., Proctor for Libelant and
Appellee, Otto George Clavel:

To Carl W. Calbreath, Clerk of the United States
District Court of the Northern District of Cali-
fornia, Southern Division:

Libelant hereby designates and requests that the
record on appeal in the above-entitled action shall
include:

1. Seaman's libel in personam;
2. Answer of respondent Pacific Tankers, Inc., a
corporation;
3. Answer of respondent United States of
America;
4. Findings of fact and conclusions of law pro-
posed by libelant and signed and filed on the records
of the Court on June 23, 1950;
5. Findings of fact and conclusions of law pro-
posed by respondent Pacific Tankers, Inc.;
6. Final Decree signed and filed on the records
of the Court on June 23, 1950;
7. Petition for an Order allowing appeal;
8. Citation on Appeal;
9. Assignments of Error;
10. Transcript of all oral testimony adduced
at the trial of said cause;

11. All of the documents, records, papers and exhibits admitted in evidence at the trial of said cause;

12. All depositions introduced in evidence;

13. Stipulation of counsel to designate Joshua Hendy Corporation as proper party respondent and appellant;

14. Notice of Appeal;

15. This designation of Apostles on Appeal and Praeceptum Therefor.

Dated: June 21, 1950.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Proctors for Respondent and
Appellant.

[Endorsed]: Filed July 21, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the appellant herein may have to and including October 9, 1950, to file the Record on Appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated: August 29, 1950.

/s/ LOUIS GOODMAN,

United States District Judge

[Endorsed]: Filed August 29, 1950.

[Title of District Court and Cause.]

CITATION ON APPEAL

To Otto George Clavel, Libellant Herein, and to
L. Chas. Gay, His Proctor:

Whereas, Joshua Hendy Corporation, a corporation, sued as Pacific Tankers, Inc., has lately appealed to the United States Court of Appeals for the Ninth Circuit from the decree which was entered in the above-entitled Court on June 23, 1950, and from the order which was entered in said Court on April 24, 1950:

You are, therefore, hereby cited to appear before the said United States Court of Appeals for the Ninth Circuit, to be held in the City and County of San Francisco, State of California, at the next term of said Court, 40 days after the date of this citation to do and give what may appertain to justice to be done in the premises.

Given Under My Hand in the City and County of San Francisco, State of California, in the Ninth Circuit on the 20th day of July, 1950.

/s/ LOUIS GOODMAN,
Judge of the United States
District Court.

[Endorsed]: Filed July 21, 1950.

In the District Court of the United States, for the
Northern District of California, Southern Division

No. 25319-G-L

OTTO G. CLAVEL,

Libelant,

vs.

PACIFIC TANKERS, INC., a Corporation, and
UNITED STATES OF AMERICA, et al.,
Respondents.

Before: Hon. Dal M. Lemmon, Judge.

REPORTER'S TRANSCRIPT

Wednesday, March 22, 1950

Appearances:

For the Libelant:

L. C. GAY, Esq.,

311 California Street,
San Francisco, Calif.

For the Respondents:

HENRY W. SCHALDACH, Esq.,

233 Sansome Street,
San Francisco, California.

(Mr. Gay and Mr. Schaldach made opening
statements.)

Mr. Gay: If your Honor please, there have been,
I think, four depositions taken in this case—two

depositions of Captain Johnson, one deposition of the Mate, Mr. Coward—these were taken by the Respondents—and a deposition taken by the Libelant of Mr. Littlewood. I think at this time I will offer those depositions in evidence.

The Court: Very well.

Mr. Schaldach: And the exhibits with them, Mr. Gay?

Mr. Gay: And the exhibits. And at this time—it may be out of order, your Honor, but I would like to put the chart on the blackboard. I think it will be helpful to your Honor.

(The depositions of Captain Johnson were marked as Libelant's Exhibits 1-A and 1-B; the deposition of George William Littlewood, Jr., was marked Libelant's Exhibit 1-C; and the deposition of Louis P. R. Coward was marked Libelant's Exhibit 1-D.)

(Mr. Gay placed a chart upon the blackboard.)

Mr. Gay: Now, if your Honor please, this chart shows—this area with numbers is the ocean, showing depths and so on, and this is China, this is Luzon, and the other Philippine Islands and this line along here was charted by the Captain from the log book and shows the course of the vessel and where it was on different days. [2*]

In other words, here it was on April 24th, here on April 25, 26, 27, 28, 29, 30th, and so on, up to Yokosuka.

The Clerk: That is part of which deposition?

Mr. Gay: It is part of the second deposition of Captain Johnson.

Will you take the stand, please?

OTTO G. CLAVEL

the Libelant, sworn.

Direct Examination

Q. (By the Clerk): Your name is Otto G. Clavel, is that correct? A. Yes.

Mr. Gay: Mr. Schaldach, as I understand it, the Pacific Tankers was the employer in this instance; is that correct?

Mr. Schaldach: That is correct. Will you stipulate, Mr. Gay, that the United States of America may be dismissed at this time?

Mr. Gay: Yes. Upon the stipulation of counsel of the Pacific Tankers, Inc., and the present name of Pacific Tankers, Inc., is Pacific Tankers, Division of Joshua Hendy; is it not?

Mr. Schaldach: Joshua Hendy Corporation.

Mr. Gay: Corporation.

Mr. Schaldach: I believe the answer sets forth that he is employed by the Pacific Tankers, Division of Joshua Hendy [3] Corporation, on the Picos at the time of this accident.

Mr. Gay: Upon the stipulation of counsel, the Pacific Tankers——

The Court: You accept the stipulation?

Mr. Gay: Yes.

The Court: Therefore dismiss the United States of America?

Mr. Gay: Right.

(Testimony of Otto G. Clavel.)

Q. Mr. Clavel, you are the libelant in this action?

A. Yes.

Q. And what is your occupation?

A. Seaman.

Q. How long have you been going to sea?

A. Forty-seven years.

Q. What is your age? A. Sixty-one.

Q. In what capacities have you gone to sea?

A. As Able Bodied Seaman, Quartermaster, and Boatswain.

Q. And you were employed on the Picos as Boatswain at the time of the matters complained of? A. Yes, sir.

Q. The vessel sailed from where?

A. The vessel sailed from San Francisco, Oakland, to Honolulu; from Honolulu to Yokosuka, and from Yokosuka it made a shuttle trip to the Persian Gulf and then came back to [4] Yokosuka.

Q. And then returned to the United States?

A. And then returned to the United States.

Q. Paid off in San Pedro? A. Yes, sir.

Q. You suffered an injury to your hand, right hand, on that trip, did you? A. Yes, I did.

Q. And how did the injury start?

A. Well, I had to make an awning for the poop deck, so the Mate asked me to make it fast, because the fellows had to steer on the poop deck and the steering gear was broken down, and I made myself two hooks, there was none on there, so I made them out of nails, I filed them out of nails, and while filing this one I scratched my finger a bit and then

(Testimony of Otto G. Clavel.)

I must have got some of that Persian dye from the canvas, because it was Navy canvas.

Q. You made hooks out of nails, is that correct?

A. Yes.

Q. You had the nails in a vice?

A. In a vice.

Q. And were filing them or bending them?

A. Yes, filing them.

Q. And you scratched your right index finger?

A. Just a little bit. [5]

Q. How much of a scratch was that?

A. It was a very little scratch, hardly noticeable, and I went back aft and washed it out and put a bandage on it.

Q. What day of the week was that?

A. Friday.

Q. And what day of the month?

A. The 23rd.

Q. 23rd of April, wasn't it?

A. Of April, yes.

Q. 1948? A. 1948.

Q. And the libel alleges that it happened on April 22, and have you since checked the calendar to see what day of the week Friday—what date Friday was? A. Yes, sir.

Q. And you asked to correct your allegation from April 22 to April 23, 1948?

(The witness nods his head in an affirmative manner.)

Q. Now, how was the finger the rest of the day and that night? Did it give you any trouble?

(Testimony of Otto G. Clavel.)

A. The first day it gave me trouble, starting in giving me trouble. When I ate I couldn't eat any more, I was sort of nauseated. The next day the finger started to swell up. It was Saturday and I couldn't work, and I knocked off work. The Mate asked me to do some work in the afternoon, what [6] is really my time off, but I couldn't do the work, and I told him I couldn't work with this finger, it was impossible.

Q. Was that overtime work you were asked to do?

A. Yes, it was Saturday afternoon. That is the reason I remember it so very well.

Q. So that was your option to not work if you didn't wish to? A. Yes.

Q. And you stated you told the Mate you couldn't work on account of your finger? A. Yes.

Q. How did the finger develop after that?

A. Well, the finger swoll up to twice its size and the hand started to discolor. So the next day I reported it to the Captain, and——

Q. That is to Captain Johnson?

A. To Captain Johnson. Well, Captain Johnson took me down and looked at the finger and started to squeeze, because it had a yellow core on it, and I told him to keep his hands off, better wash his hands before he squeezed it on that finger. and from then on the Captain never touched anything, and he cut that finger——

Q. All right, that is the only treatment that the Captain gave you? A. Yes.

(Testimony of Otto G. Clavel.)

Q. Now we are speaking of Sunday, which would be the 25th [7] of April? A. Yes.

Q. Did you see the Mate after that?

A. Yes, then I saw the Mate, and the Mate told me to soak my hand in Epsom Salts.

Q. Did he give you Epsom Salts?

A. He gave me Epsom Salts and I soaked it every two hours.

Q. Now, how was the finger on Monday, which would be Monday, the 26th of April?

A. Monday the hand was discolored and the arm started to swell up, and that is when I asked the Captain to do something for this hand, either—told him to call up a shore station for a hospital to radio for medical advice.

Q. Will you turn towards his Honor? I think he is having difficulty.

The Court: Go ahead.

A. —or send me ashore, if possible, somewhere.

Q. Did you say anything to him about any other treatment, drugs?

A. Well, I asked him for penicillin. He said there isn't any more aboard.

Q. When you stated you asked the Captain to call up, I believe you said, what did you mean by that?

A. I mean to radio, to call up a hospital and ask for medical advice, how to cut and how to treat this finger, what [8] is done mostly on ships in cases like this.

(Testimony of Otto G. Clavel.)

Q. And what did the Captain say to that?

A. The Captain said, "That is not necessary, the Mate will take care of this."

Q. And you stated also that you said something to the Captain about being taken to a hospital?

A. Yes.

Q. What did you say to him and what did he reply?

A. Well, I asked him if it was possible to go to the nearest port, which would have been in this case Manila, and he said, "That is not necessary, it will be a couple of more days, four, five or six days we are in Yokosuka, and then you can go to the Navy Hospital."

Q. All right. Now, on Tuesday, the 27th, that is the following day, what was the condition of your hand on that day?

A. Well, the finger was swollen up to twice its size. The hand was altogether swollen and the whole arm was swollen. That is when the Mate decided to cut the finger.

Q. And was it on the 27th of April, 1948—did he make a cut on that day?

A. He made a cut on that day, yes.

Q. Tell his Honor then what was done.

A. Well, the Mate cut the finger just above this right here (indicating). He cut, then he squeezed the pus out, quite a bit of pus out, and then he bandaged the finger again [9] and let me go, and on my way back I ran into the Captain on the poop deck and I said, "Captain, I don't feel good

(Testimony of Otto G. Clavel.)

about this cutting on my finger, there is only one right hand I have got. How about getting close to Manila and asking for advice, or sending me ashore?"

He said, "Well, it is cut all right, that is all that is necessary."

Q. Now, did you continue on the vessel until it reached Yokosuka? A. Yes.

Q. The log book of the vessel shows that the vessel reached Yokosuka on May 3rd, your Honor. Tell us about the condition of your finger from the time it was cut on April 27th, 1948, until the vessel reached Yokosuka.

A. Well, after the Mate cut the finger, the upper part of my finger started to heal up, because he put some healing powder on it, and the finger started to get worse here (indicating), and started to get very badly infected here (indicating). This finger was all swollen up, and the whole hand was pussy, so the Mate had to let that pus out and the arm was still swollen. Well, he put some salve on here (indicating), and that got rid of this, but by the time I got to Yokosuka—we came in in the afternoon, and I asked the Captain to be sent ashore. He said, "We haven't got any passes." [10]

I said, "Captain, after all, I don't think I want to go ashore to amuse myself, I would like to see a doctor, because this hand bothers me very much and worries me very much."

"Well," he said, "wait until next day."

(Testimony of Otto G. Clavel.)

And the next day he brought me with other patients to the hospital.

Q. Now, with reference to your right index finger, prior to the time it was cut, was it straight?

A. No, it started to crook more and more, so by the time we arrived in Yokosuka the finger was at a right angle so it couldn't move any more.

Q. Was it stiff? A. It was stiff, yes.

Q. It was bent like that at a right angle?

A. Right angle.

Q. So it is your statement you were taken to the hospital in Yokosuka on May 4th, assuming the vessel arrived on May 3rd? A. Yes.

Q. What treatment did you receive there?

A. Well, they gave me right away penicillin treatment, and the doctors, so as to make it stronger, they gave me sulfa treatment at the same time.

Q. How often were you given penicillin?

A. Eight times in twenty-four hours.

Q. And for how many days were you given that?

A. I was there for three and a half days, and then I was sent back to the vessel.

Q. Now, did the doctor there say anything to you about operating on the finger, or anything of that sort?

A. Well, I asked the doctor, because this part was very badly swollen (indicating)——

Mr. Schaldach: Just a moment. Your Honor, I will object to any conversation between the Naval Doctor and this man there.

The Court: Sustained.

(Testimony of Otto G. Clavel.)

Mr. Gay: If your Honor please, I would like to ask the question and limit the purpose of it—Mr. Clavel is charged generally with contributory negligence, and I offer this testimony solely to show he was acting in accordance with the doctor's instructions in coming back.

The Court: Well, it would be hearsay, to testify as to what the doctor told him would be hearsay. It is objectionable on that ground.

Q. (By Mr. Gay): You returned to the ship, did you? A. Yes.

Q. And was that with the consent of the doctor in Yokosuka?

A. That was with consent of the doctor.

Q. And did he give you any medicines or pills to take, and any instructions as to what to do with the finger?

A. Yes, he gave me some Epsom Salts, what they didn't have [12] aboard the ship, and he gave me penicillin.

The Court: You say he gave you Epsom Salts?

A. He gave me Epsom Salts, what they didn't have aboard the ship, and gave me penicillin.

Q. (By Mr. Gay): When did they run out of Epsom Salts?

A. Just before we arrived in Yokosuka. I had to use cooking soda to soak my hand.

Q. Did he give you some penicillin?

A. Yes, he gave me—he asked me how long would that trip back be. I told him about eight days, and

(Testimony of Otto G. Clavel.)

he gave me some penicillin to take back with me, and I asked him—he said, “Well,”——

Mr. Schaldach: Just a moment, Mr. Clavel. I object to what the doctor told you as hearsay.

The Court: Yes, sustained.

Q. (By Mr. Gay): You returned on the ship, did you? Did you do any work on the way back, Mr. Clavel?

A. No, I didn't. The last few days the Mate asked me to supervise the bending of the mast, because he had a lot of work to be done, so I supervised that work, but I couldn't work with my hands.

Q. Do you remember what day of the week it was you arrived in San Pedro?

A. It was Saturday.

Q. When did you get paid off? [13]

A. The 24th—the 25th of May.

Q. How many days elapsed, if you recall, from the time you got to San Pedro until you were paid off?

A. About three days.

Q. And then what did you do?

A. As soon as I was paid off, I took a plane and came to San Francisco, because I wanted to be home, and I went to the Marine Hospital and they took me the next day.

Q. How long did you remain as an in-patient?

A. Twenty-one days first——

Q. What sort of treatment did you receive there?

A. The same treatment, penicillin.

Q. How often? A. Eight times a day.

Q. For how many days?

(Testimony of Otto G. Clavel.)

A. For twenty—I mean twenty-one days. It might have been twenty.

Q. Did you do anything else for your hand there?

A. Well, they soaked it—put it in an oven with Epsom Salts.

Q. In an oven?

A. Oven, an electric, what they call a basket.

Q. And then after twenty-one days you were made an outpatient; is that right?

A. For one month I remained an out-patient, because my hand [14] was altogether stiff by then, and they started to move my fingers back again. My fingers were moved for thirty days.

Q. How often did you report to the hospital while you were an out-patient?

A. Every day I had to go to the therapy ward for my treatment.

Q. Did they take you back to the hospital later on?

A. Well, after thirty days I had to see the doctor—he wanted to talk to me, and he didn't want to operate on it yet, because he thinks there is still infection in the finger, to come back in three weeks, so I came back in three weeks and they amputated the finger.

Q. And they removed the finger?

A. Below the knuckle.

Q. Back of the—— A. Knuckle.

Q. ——knuckle? A. Yes.

Q. Did the finger heal up all right?

A. Yes, the finger healed up all right.

(Testimony of Otto G. Clavel.)

Q. And after it healed up, how was it; was it sensitive, or not?

A. Was it sensitive? I didn't dare to go back to work, because on board ship you hit your hands all the time. I didn't dare to go back to work, so I stayed ashore until March [15] the following year, that was 1949, the second of March I shipped out on the Mission Dolores.

Q. What ship?

A. The Mission Dolores, the same company.

Q. That is a tanker also? A. A tanker, yes.

Q. Did you experience any difficulty in working when you went back to work?

A. Well, on that first trip when we came to Japan it was very cold and sleety, and I couldn't stand that terrible pain, the finger was too sensitive, this finger and this finger besides (indicating).

Q. You indicate the middle finger?

A. Yes, the middle finger, too. So I told him, "I hate to quit when I come back."

He says, "Well, the weather is getting warmer. Perhaps you can try to make another trip." So I stayed on this ship for ten months, and then I quit, I had to quit.

Q. What, if any, difficulty do you have with that hand at the present time, Mr. Clavel?

A. Well, the finger is awfully sensitive and all the time cold, and so is this knuckle here (indicating).

Q. Indicating the middle finger?

A. The middle finger, too, but this is worse. This, too, this is swollen up (indicating). [16]

(Testimony of Otto G. Clavel.)

Q. When does it bother you the most?

A. In cold, wet weather.

Q. Now, will you just show his Honor the extent to which you can close your hand? (The witness demonstrates.) You can't bring this finger down? (Indicating.) A. No.

Q. And is it enlarged in the joint here from what it was before? A. Yes.

Q. Does this finger also bother you in cold weather? A. Yes, this does, too. (Indicating.)

Q. Was that the reason that you got off the "Mission Dolores"?

A. That is the reason I got off the "Mission Dolores," yes.

Q. In your opinion, are you able to work during the cold months of the winter?

A. No, I can't. I can't fulfill my duties properly.

Q. (By the Court): When was it you left the "Dolores"?

A. The 28th of December.

Q. The what? A. The 28th of December.
Mr. Gay: 1949.

The Court: And you haven't shipped since then?

A. No, sir.

Q. (By Mr. Gay): Now, in doing your work, is there any particular work that you have difficulty in doing by reason [17] of the injury to your hand?

A. Mostly in handling loads, or, for instance, I can't hold a hammer very tight any more. I get a hammer in my hand and it drops out of my hand

(Testimony of Otto G. Clavel.)

because I haven't got the proper grip any more.

Q. Did the vessel have a radio, Mr. Clavel?

A. Yes.

Q. Did the Pacific Tankers have other vessels on that same shuttle run?

A. Yes, quite a few of them; quite a few of them.

Q. How many, if you know?

A. Well, I couldn't say, about fifteen, eighteen or twenty, around there.

Q. Traveling, going back and forth on the same approximate course that you were on?

A. Yes.

Q. And on this voyage along through here on April 24th, 25th, 26th, 27th, and 28th, and so on, did you pass other vessels?

A. We did, yes.

Q. Large vessels?

A. Tankers. All tankers.

Q. What were your monthly earnings on the Picos? What was your monthly pay?

A. \$250.00 those days.

Q. Has it since been increased? [18]

A. It is \$300.00 now.

Q. And did you receive overtime pay?

A. Yes, I made an average of \$180.00 overtime a month.

Q. (By The Court): A hundred what?

A. \$180.00.

Q. (By The Court): One hundred and eighty?

A. Yes.

Q. (By Mr. Gay): So that your total earnings

(Testimony of Otto G. Clavel.)

at that time were—how much did you say the base pay was, two hundred what?

A. Two Hundred and Fifty.

Q. Two Hundred and Fifty and about One Hundred and Eighty?

A. A dollar forty for overtime.

Q. At that time your earnings were about \$430.00 per month; is that right? A. Yes, about.

Q. After you went back to work, you have testified that you worked on the same type of vessel, the Dolores, and you were on there approximately ten months. How much did you pay off with from the Dolores, what was your total earnings?

A. \$4,800 in ten months—four days less than ten months, your Honor. I have the slip here.

Mr. Schaldach: Well, that is approximately \$400.00 a month, Mr. Gay.

Mr. Gay: That is \$4,800 even?

A. Well, I have my slips here. There may be some slight pennies difference, but it is \$4,800. [19]

Q. In a little less than ten months?

A. Four days less than ten months.

Q. Now, Mr. Clavel, do you know of your own knowledge what drugs are customarily carried in the medicine chests of vessels?

Mr. Schaldach: Just a moment. Your Honor, I object to that as incompetent, irrelevant, and immaterial, no foundation laid whether this man ever acted as a pharmacist or medical man aboard any vessel. It is a licensed officer or a pharmacist mate, if the vessel is a large one.

(Testimony of Otto G. Clavel.)

The Court: If he knows of his own knowledge, he may answer. Overruled.

A. What is the question?

Q. (By the Court): Of your own knowledge, what medicines do vessels carry?

A. They carry penicillin, they carry bandages, they carry all kinds of salves.

Q. Can you name some vessels you have been on that carried penicillin?

A. Well, the last ship I was on the Captain always had a big supply of penicillin.

Q. That is the Mission Dolores?

A. That is the Mission Dolores.

Q. A tanker? A. Of the same company.

Q. Have you been on any others where they carried penicillin?

A. I was on the tanker Coquill; she carried penicillin.

Q. (By the Court): When were you on that vessel? A. Two years ago.

Q. I assume before you were on the Picos?

A. Yes.

Q. Did the Picos have penicillin on board on the return trip from Japan? A. Yes.

Q. Do you know that of your own knowledge?

A. I saw the Captain when we were at Yokosuka Navy Hospital there, the Pharmacist Mate gave me three or four boxes of penicillin.

The Court: That was before you left Japan to go to the Persian Gulf?

(Testimony of Otto G. Clavel.)

A. No, before we left Japan to go back to San Pedro.

Mr. Gay: On the return voyage.

Mr. Schaldach: That is after this happened.

The Court: Yes.

Q. (By Mr. Gay): Were you given any penicillin on the return voyage? A. No.

Q. Did you ask for penicillin?

A. I asked for it, yes.

Q. What was the reply? [21]

A. Well, the Mate told me——

Mr. Schaldach: Just a moment, your Honor. I object to that as no foundation laid as to who he had the conversation with.

The Court: Sustained.

Q. (By Mr. Gay): Who did you ask for it? Who did you ask for penicillin?

A. I asked the Mate for penicillin.

Q. And what did he reply?

Mr. Schaldach: Now what Mate are you talking about?

Mr. Gay: All right. Was this on the return voyage?

A. The Chief Mate was the one I talked to. The Second Mate hardly had anything to do with it.

The Court: That is the trip from Japan back to the United States?

A. Back to the United States, yes.

Q. You asked the Mate for penicillin?

A. For penicillin.

Q. What did he say?

(Testimony of Otto G. Clavel.)

A. He said he couldn't give it to me, because he had a gonorrhea case and a syph case, and they needed it.

Mr. Gay: You may cross-examine.

Mr. Schaldach: Take the recess, your Honor, at this time?

The Court: Very well.

(Recess.) [22]

Cross-Examination

By Mr. Schaldach:

Q. Now, Mr. Clavel, you stated that it was on the 23rd day of April that you were making this hook and that you pricked your finger?

A. Yes.

Q. And you treated—you washed and put a bandage on it after that?

A. My own bandage, yes.

Q. Your own bandage. You didn't report that to anyone, did you, on that day? A. No.

Q. You didn't report it, as a matter of fact, for some three days after?

A. No—Saturday—it was exactly Saturday I told the Mate I couldn't work overtime this afternoon, my finger hurt me too much.

Q. You said it was Saturday, the next day, you told the Mate?

A. Yes, I told him. He wanted me to work overtime.

(Testimony of Otto G. Clavel.)

Q. He wanted you to work overtime, and that was the first time you told him?

A. That was the first time. I told him in the afternoon, see, I am knocking off, I can't do the work.

Q. (By The Court): Did you tell him why you couldn't?

A. I told him my finger hurt me. [23]

Q. (By Mr. Schaldach): Now, are you sure it wasn't the twenty-fifth the first time you talked to the Mate about it?

A. It was the twenty-fourth, it was Saturday.

Q. It was Saturday?

A. Saturday afternoon.

Q. And did the Mate do anything on Saturday for your finger?

A. He did not. He said, "See how it is tomorrow, and then come to me."

Q. And on the 25th you came back to him?

A. I reported first to the Captain.

Q. You reported first to the Captain. The Chief Mate, Mr. Coward, he was the medical officer aboard that vessel, wasn't he?

A. He did all the treatment.

Q. He did what?

A. He did everything aboard the ship.

Q. He did everything aboard the ship in the way of medical treatment? A. Yes.

Q. Do you know whether or not he had a medical certificate, a first aid certificate?

A. No, I don't know that.

(Testimony of Otto G. Clavel.)

Q. Do you know, Mr. Clavel, that all officers aboard vessels are given first aid medical information before they become officers? [24]

Mr. Gay: Object to that as being argumentative, if your Honor please.

The Court: Overruled.

Q. (By Mr. Schaldach): You have been going to sea for forty-seven years, haven't you?

A. Yes.

Q. You know of your own knowledge that all the licensed officers are given a first aid course, don't you? A. Yes.

Q. Before they can become an officer, they have to have some knowledge of first aid and medical treatment to meet situations at sea of this nature; is that correct?

Mr. Gay: Whether it is of this nature, if your Honor please, I will object to that as argumentative.

The Court: Well, yes. If you limit it to ordinary scratches, I will permit it.

Mr. Schaldach: Isn't that right, Mr. Clavel?

A. I suppose so.

Q. You suppose so. Now, on June 22 of 1948 you gave a signed statement about the happening of this matter, didn't you, to Mr. Hall of our office?

A. Right.

Q. You did. I will show you this document of two pages and ask you if on each of the pages your signature appears at the bottom there?

A. Yes, that is right. [25]

Q. You remember giving that, don't you?

(Testimony of Otto G. Clavel.)

A. Yes.

Q. Didn't you tell Mr. Hall that after the time that you pricked your finger with this sail hook that without reporting this incident to anyone you washed the finger and looked around for a band-aid, "but as I was unable to find one, I continued my duties and finished the job of sewing the canvas in question. My finger seemed to be in a satisfactory condition for a period of about three days, but at the end of that period it began to swell."

Did you tell that to Mr. Hall?

A. I must have, if it is in that statement.

Q. How is that?

A. I must have, if it is in that statement.

Q. You must have told that to Mr. Hall. And then after you reported it to the Chief Officer, he gave you some Epsom Salts in hot water, and you used that treatment; isn't that correct?

A. Yes.

Q. And he knocked you off work, he said you didn't have to work now?

A. Right.

Q. "I want you to stay down here and take care of that finger, soak it in Epsom Salts"?

A. Right.

Q. And how many times a day did you do that?

A. Every two hours.

Mr. Gay: Pardon me, your Honor, I have a doctor here. Would it be satisfactory——

The Court: Yes. Step down.

DR. FRANCIS J. COX

called for the Libelant, sworn.

Direct Examination

By Mr. Gay:

Q. Dr. Cox, you are a physician and surgeon licensed to practice and practicing in the City of San Francisco, are you? A. Yes, sir.

Q. Will you tell his Honor about your education, experience and qualifications, and specialty, if any?

A. I graduated from the University of California Medical School. I have had post graduate training in orthopedic surgery. I am a member of the American Board of Orthopedic Surgery, and Assistant Professor of Bone and Joint Surgery at Stanford University Medical School. I am in charge of the orthopedic service at the San Francisco Hospital, and I am a Senior Consultant in Orthopedic Surgery to the Veterans' Administration at Fort Miley.

Q. Did you examine Mr. Clavel at my request?

A. Yes, sir.

Q. Will you state when you examined him and what you found? [27]

A. I examined Mr. Clavel on the 25th of February, 1950, and I obtained the following history from him, that on the 24th of April, 1948, he was employed as a Boatswain aboard the U. S. Navy tanker Picos. The ship was sailing in the Indian Ocean at the time, and he said he was filing a nail to make a sail hook when he accidentally scratched

(Testimony of Dr. Francis J. Cox.)

the dorsal aspect of his right index finger. Later on he sewed some canvas which was impregnated with Paris green dye. He didn't think much of the wound at the time, simply washed the wound out and covered it with a Band-aid for the first day, and then the next day the hand became exceedingly painful and swollen, and he reported it to the Chief Mate and stopped working. He started using Epsom Salt soaks on the hand, and the finger and the hand became more and more swollen and about the fourth or fifth day the finger was very badly discolored and the hand swollen and red. The finger was lanced by the Mate. The patient states some pus was obtained. Following the lancing, the right index finger continued to be stiff, painful, and swollen. The top of his hand also became involved in the infection.

The ship continued to Japan. The ship arrived there approximately ten or eleven days after his original injury and within about five days after the finger was lanced and bandaged by the Mate.

He was sent to the Navy Hospital and given some penicillin there. The acute nature of the infection in the hand [28] subsided to some degree and he was put back on the ship and allowed to continue to the United States.

Following arrival in San Pedro, about eighteen days after leaving Japan, he came immediately to San Francisco and was admitted to the Marine Hospital in San Francisco. He remained hospitalized for twenty-one days, and during that time was

(Testimony of Dr. Francis J. Cox.)

given a course of physio-therapy there. His hand was quite stiff and he was sent to the physio-therapy department for about a month. After that treatment was stopped, the hand was still kept under observation for another three weeks or so, and then finally around the middle part of August the right index finger was amputated through the distal portion of the proximal phalanx. That is this joint of the proximal interphalangeal joint (indicating).

The amputation stump healed. The patient still had some pain and difficulty with his hand and said that he was unable to work until the first of March of 1949. At that time he returned to work as a Boatswain and continued to serve until about two months prior to the time I examined him.

He was still at the time I saw him complaining of a disturbance of function in the grip of the hand, first due to the loss of the index finger, or a portion of it, and secondly because of some restriction of motion in the adjacent fingers. He also complained of weakness which was coincidental with the difficulty in grip, and he complained of some pain in his [29] amputation stump. The pain in his amputation stump he described as being worse during damp, cold weather, and that it was somewhat better during warmer weather.

He gave me a history in the past of having had a rather serious fracture of the mandible in 1938, which became impacted, requiring some reconstruc-

(Testimony of Dr. Francis J. Cox.)

tive surgery. He said he had still some trouble because of this injury.

Otherwise, his history was essentially non-informative.

So far as a physical examination was concerned, there was nothing particularly abnormal except with respect to the right hand. He had an amputation through the right index finger, through the distal end of the proximal phalanx. The amputation stump was scar covered with soft, pliable skin. It wasn't thickened at any point. There was no positive evidence of oidium, which is an inflammatory change, in any of the distal nerves at the end of that stump. The amputation scar cover surrounded the proximal interphalangeal joint—that is the proximal joint as I demonstrated on my hand—of the middle finger, and there was some definite restriction of mobility in the intrinsic joints of that finger.

In attempting to make a grip, the tip of the right middle finger failed to touch the proximal crease by a distance of one and a half inches. That is as you bring the hand down into a grip functionally the digit came to a point approximately one and a half inches from the proximal portion of the [30] palm, and the finger also failed to touch the distal palm crease by three-quarters of an inch. Those are measurements used to indicate the degree of motion.

The fourth and fifth fingers showed a normal range of movement, so the majority of limitation

(Testimony of Dr. Francis J. Cox.)

of movement was in the index and middle fingers. The fourth and fifth showed normal range.

So far as the grip function was concerned, there was definite disturbance in gripping power. The patient is a right-handed individual, and the grip function in the right hand was measured at 75 kilograms as against 100 kilograms on the left side. That does not necessarily mean that there is a one-fourth difference between the two hands, because of the fact that normally a person who is right handed should have a grip power in his major hand which is somewhat in excess of his minor hand, the left hand.

I did not obtain X-rays of this patient, because I felt none were indicated. He had a very satisfactory amputation, he had a restriction of motion in his finger, he had some loss of gripping power, which is entirely compatible with the loss of the digit, and with the restriction of mobility in the interphalangeal joint of his middle finger. I felt that his disability was perfectly evident and nothing further would be added by additional X-rays.

Q. Now, Doctor, you have stated that the patient complained [31] of pain in the stump and the adjacent finger in cold weather. Is that a reasonable complaint, and, if so, what causes the pain?

A. That is an entirely reasonable complaint, but the exact cause of it, however, is one which we as doctors have not quite found as yet. It is commonly termed the causalgia type of pain, and that term is used for lack of a more anatomical term. It is

(Testimony of Dr. Francis J. Cox.)

purely a descriptive term. Wherever amputation of an extremity has been executed, the patient may well have symptoms of phantom pain in that portion of the limb or digit which has been amputated, any many times the symptoms of causalgia pain are made worse during changes in weather. Some theorists say it has something to do with changes in atmospheric pressure, but whether or not that is a fact I don't know.

The Court: Will that improve in time, or not?

A. Generally it will improve immediately after an amputation, but here it is a year and a half after the amputation and the causalgic factor of pain remains unchanged.

Q. (By Mr. Gay): Now, Doctor, it is the testimony here, and I believe it is the history that the patient gave you, that he suffered a slight scratch on one day and then two or three days after that the finger was very much swollen and painful, and also shortly after that the hand and also the forearm became swollen. Does an infection or can an infection proceed in that manner? [32]

A. A virulent infection can proceed that rapidly.

Q. What is the proper treatment for an infection of that type?

Mr. Schaldach: Well, now, I will object to that. There are several different types of infection and under different circumstances, and the question is too general.

The Court: The doctor can answer it. Overruled.

(Testimony of Dr. Francis J. Cox.)

A. A virulent infection is best handled by complete immobilization and the administration of antibiotics such as penicillin or one of the newer ones, such as streptomycin.

Q. (By Mr. Gay): Doctor, will you state whether or not penicillin was generally known and used in April, 1948?

A. Yes, it was universally available in 1948; at least in the American market.

Q. Was it a recognized treatment for infections at that time?

A. Definitely recognized at that time.

Q. Now, Doctor, it has also been the testimony that this injury, the original scratch, was suffered on or about April 23, 1948, and that the patient reached a hospital in Yokosuka on or about May 4, 1948, and at that time the hand was swollen and the finger had—the index finger, which previous to the accident had been straight, was crooked down to a right angle. Can you state what would cause the finger to crook in that fashion, just having knowledge that he had an infection? [33]

A. On a purely theoretical basis, and that is all that I can use, if the patient did have an infection in the finger or in the proximal interphalangeal joint which would spread into the soft tissues, then it would cause an extension of the infection into the tendon sheaths, and this being the flexor tendon, that sheath as it became involved would pull the finger into position of a flexion. In any infected hand or finger the attitude is always one of flexion of the fingers.

(Testimony of Dr. Francis J. Cox.)

Q. What can you say, if you can answer the question from the facts as given to you as to the advisability of an amputation of the finger down into the hand or at—in Japan and while some infection still persisted?

A. Well, that is a difficult question for me to answer, because it poses a problem, and if you present the problem in this sense, that the patient had infection active in the palm, then I would say that the amputation was ill advised. In this particular instance I would say that the patient is fortunate that the amputation was not done, because he has a better hand for not having had that procedure done. He has salvaged more use in his extremity for the fact that the amputation was not performed at a higher level.

Q. And as the patient now is as you observed him, is any further operation indicated or not?

A. I would definitely say no.

Mr. Gay: You may cross-examine. [34]

Cross-Examination

By Mr. Schaldach:

Q. Doctor, boiling it down, this man has a partial loss of the right index finger, doesn't he, as indicated by the amputation? A. Yes, sir.

Q. And he has some limited motion of the right middle finger? A. Yes, sir.

Q. A little bit of limited motion, not too much?

A. That limitation is not a question of loss of

(Testimony of Dr. Francis J. Cox.)

motion of the interphalangeal joint; the limitation as I see it is a failure of the grip function in the two opposing digits through which grip is created against the palm; so that he could have that limitation of motion in his fifth finger with little or no difficulty, and his fourth finger with less difficulty or with slightly more, but having lost the index finger then the limitation of motion in the middle finger is of greater importance. The main effect is that he cannot make a grip. It isn't the loss of motion in the interphalangeal joint so much as it is——

Q. The loss of the index finger?

A. No, sir. I say the loss of grip function.

Q. There is no causal connection between the infection that was present in that index finger and the loss of extension or motion in the middle finger, is there?

A. Yes; I would disagree with that statement completely. There is, I would say, definitely and positively a relation between the two. [35]

Q. In what way, Doctor?

A. There is a small cellulitis in the interstitial fibers and the soft tissue of the capsules of the interphalangeal joint, of the tendon sheaths and of the other vital structures surrounding the tendons and joints. In short, I have seen patients who have not had anything other than a simple cellulitis who have wound up with stiff fingers. You can get a stiff finger from nothing more than simple immobilization following a fracture with no

(Testimony of Dr. Francis J. Cox.)

infection whatsoever. It is the swelling, the edema, and the scarring that occurs in the deeper structures that causes the stiffness.

Q. Doctor, you say you examined this man for the first time on February 25 of this year?

A. Yes, sir.

Q. You had no previous examination of this man? A. No, sir.

Q. The pad, Doctor, that is over that finger is in good shape? A. Very good shape.

Q. No neuromas there, you said?

A. No, sir.

Q. And he gives you, does he, the history of the fact that it aches in cold weather?

A. Yes, sir.

Q. And you attribute that to—what is that name, Doctor? [36] A. Causalgia.

Q. There is nothing objective that you can put your finger on that causes that, is there?

A. As I indicated, I believe, before, there is no known cause for it. It is all—first let me say that it is very common following any amputation. Second, it is thought to be caused by some reflex mechanism through the sympathetic system, but I have known patients who have had causalgic pain of rather severe grade who have had series of amputations through any extremity and the pain has persisted. It is a real entity even though we are unable to classify it entirely on an anatomical basis.

Q. There is no evidence of atrophy of any of the fingers or the hand?

(Testimony of Dr. Francis J. Cox.)

A. The right hand, yes, I did mention, because it is rather obvious to me that with the loss of normal grip function there is some atrophy of the intrinsic musculature.

Q. Did you make some measurements?

A. There is no way to measure the atrophy of the intrinsic musculature of the hand.

Q. I am talking about the hand. There is no atrophy about the hand generally, is there?

A. No, he has a very good function of the extremity, although it is not perfect, but it is functional anatomically, and that is the reason I believe no further treatment is [37] indicated.

Q. Neither would you suggest any surgery or any physio-therapy on the hand?

A. I think his hand is as good as it is going to get now, so that no further medical treatment is indicated or needed.

Q. Did you take the grip measurements of the right hand and left hand, Doctor? A. Yes.

Q. What percentage did you find he is lacking in the right hand?

A. The actual measure of the lack is a lack of 25 per cent. However, as I indicated before, that lack is not accurate, because this is his major extremity, and usually in a normal individual there will be perhaps an improvement of 20 to 25 per cent in the grip function of the major extremity as compared with the minor. So although the measurable change is 25 per cent, I would make that

(Testimony of Dr. Francis J. Cox.)

figure just moderately higher than that, about 35 per cent.

Mr. Schaldach: 35 per cent. I see. That is all.

Redirect Examination

By Mr. Gay:

Q. I have just one or two more questions, Doctor. Are penicillin and sulfa drugs ever given in combination?

A. Yes, they are. They are given in combination in the presence of certain types of mixed infections, where there is [38] one strain of organism which is resistant to perhaps penicillin, a strain of organism which might be hit by the sulfanalamide or the sulfa drug.

Q. And would you state, Doctor, just generally how efficient or potent, if that is a better word, penicillin and sulfa drugs have been found to be in cases of infection?

A. Well, speaking from my own experience, we started using sulfa just before the war and we found it fairly advantageous. However, when penicillin first hit the medical profession during the war in 1943, the difference between the two drugs was amazing, because the specificity of penicillin for many of the ordinary routine types of infections was so much superior to sulfa that there was no comparison between the two, and I believe that fact still holds. Penicillin is far above, superior for the average common ordinary type of infection that we see to any of the sulfa preparations.

(Testimony of Dr. Francis J. Cox.)

Mr. Gay: That is all.

Recross-Examination

By Mr. Schaldaeh:

Q. Doctor, assuming for the moment this man, Mr. Clavel, was aboard a tanker and he had not given you any history and there was no penicillin or sulfa drugs in the medicine chest of that vessel and he had an infection which is indicated of the right index finger which did not appear to be serious on the second day after it happened, what would be the treatment indicated, Doctor, if you were the [39] medical officer aboard that vessel?

A. The treatment indicated would be to rest it, to apply heat in the form of hot soaks and to give the patient as much supporting therapy as could be furnished. In short, I would keep continuous hot soaks on the hand, keep it under observation, keep it as quiet as possible. From my own experience I would say complete bed rest, but whether that is possible on a tanker or not I don't know.

Q. Assume the man was taken off work, told to knock off, would that be one of the things you would do? A. Yes, very definitely.

Q. You would soak it in hot Epsom Salts? If you had them aboard the vessel, and if you had any ichthyol or ichthymol ointment would you apply that as a drawing power to bring it to a head?

A. If you are talking—I would say no.

(Testimony of Dr. Francis J. Cox.)

Q. In other words, you would continue the Epsom Salts soaking treatment? A. Yes.

Q. That would have a drawing power to bring it to a head, if you soaked it in hot Epsom Salts every two hours?

A. That is true, by creating hyperemia, which has the power of collecting an increasing supply of blood to the area so that a barrier can be more easily built up by the body against the infection or infecting organism. All of the things that [40] you are talking about do that same thing, except through different physical means.

Q. And, Doctor, if that came to some sort of a head, a bag of pus or something of that nature on his finger, would you lance it to relieve the pressure? A. Yes, definitely.

Q. That is indicated treatment, isn't it, to lance it to relieve pressure?

A. Not only to relieve the pressure, but to prevent further spread of the infection that is a logical thing to do.

Q. And would further soaking thereafter further reduce the edema, if any, in the hand and the fingers? Is that correct? A. Yes.

Mr. Schaldach: That is all.

Redirect Examination

By Mr. Gay:

Q. Now, I have one further question. Doctor, assuming further that after two or three days the whole hand, not only the index finger swollen to

(Testimony of Dr. Francis J. Cox.)

twice its normal size, but the hand becomes very badly swollen and was red and blue and purple and yellow, and also the swelling got up into the forearm, would you say that that indicated anything for concern?

A. I think that is a cause for major concern, because you are dealing with a man's right hand.

Q. Pardon me?

A. You are dealing with a man's right hand, the most important [41] member that he has to live with. I mean it is of extreme importance.

Q. And would you say under those circumstances, if the hand and arm were in the condition that I have described that expert medical care was vital?

A. I would feel definitely so.

Q. And would you say that a course of penicillin treatment would be indicated?

A. Definitely.

Mr. Gay: That is all.

Mr. Schaldach: No further questions. Thank you.

OTTO CLAVEL

the libelant, resumed the witness stand, previously sworn.

Cross-Examination

(Continued)

By Mr. Schaldach:

Q. Now, Mr. Clavel, did you keep notes or records of any of these dates that you first pricked your finger and the date that you first went to see the Chief Mate and the date that you first talked to him? A. Yes, I did.

Q. You did keep a record note of that?

A. Yes.

Q. And the time on the vessel?

A. Yes, I have those dates written down.

Q. You say you do have those dates written down? [42]

A. I have those dates written down.

Q. When did you make that writing?

A. I made it after we came to Yokosuka. I asked the fellow who was there to write it down for me, because I remembered still the date. I remembered the dates, and I asked a fellow, a fellow whom I knew, to write those dates down for me.

Q. You asked him to write them down?

A. Yes.

Q. Who was the fellow?

A. He was a fellow who laid in the Yokosuka Navy Hospital with a broken leg.

Q. Did you keep that piece of paper?

(Testimony of Otto Clavel.)

A. I kept that piece of paper, yes. I have it somewheres home.

Q. What is the last time you saw that?

A. Oh, after I came out of the hospital.

Q. After you came out of the hospital. And did you have that piece of paper on you or in your possession on June the 22nd, 1948, when this statement was taken from you? A. I must have.

Q. You must have had it then, and did you refer to that piece of paper with those dates on it when you gave this statement?

A. I did not exactly.

Q. You did not exactly do that; is that what you said? [43]

A. I didn't exactly do that, no.

Q. Well, Mr. Clavel, on June 22, 1948, your memory about this would be a lot better than it is now; isn't that true? A. Well, yes and no.

Q. Well, here two or three months after the accident, wouldn't your memory be better then than it is at the present time? It would be fresher in your mind, wouldn't it?

A. I just came out of the hospital and by that time I felt the finger would be saved, it wasn't amputated.

Q. Well, Mr. Clavel, you were making a claim because of the fact that you had an injured hand?

A. That is right.

Q. And you gave Mr. Hall all the information regarding that hand?

(Testimony of Otto Clavel.)

A. I gave the information how they were put in my mouth.

Q. I don't understand, Mr. Clavel.

A. Well, Mr. Hall suggested some things, and I would say yes.

Q. Oh, he suggested certain things and you said yes? A. Yes.

Q. Mr. Clavel, did you read this statement after Mr. Hall had it typed up for you?

A. Yes, I did.

Q. You read it? A. Yes.

Q. Did you make any objection to anything he had in there as [44] not being what you told him?

A. No, I didn't, because Mr. Hall said, "Now, don't you worry a bit, we will take care of you."

Q. And he did, you got maintenance, didn't you?

A. Yes, I got two months.

Q. You were paid maintenance?

A. Yes, two months.

Q. And you were paid transportation, weren't you? A. Yes.

Q. In other words, you gave Mr. Hall all you figured you knew about this case at that time, is that right?

A. Well, Mr. Hall told me, "You will be fixed up all right, don't you worry, we will take care of you."

Q. But you read the statement, did you?

A. Yes, I did.

Mr. Schaldach: Your Honor, I will ask at this

(Testimony of Otto Clavel.)

time the statement be introduced into evidence as Respondent's first in order.

Mr. Gay: No objection.

(The document referred to was marked Respondent's Exhibit A.)

Mr. Schaldach: Now, what was the name of the Captain aboard that vessel, the Picos?

A. Johanson.

Q. Johnson or Johanson? What was the First Mate's name? [45]

A. Coward.

Q. Do you remember what the name of the Second Mate was?

A. No.

Q. You don't remember him. Did you ever talk to the Second Mate about this, or complain to him about your hand?

A. No. The Boatswain has nothing to do with the Second and Third Mates.

Q. I see. The only complaints made were to the First Mate and the Captain?

A. That's right.

Q. Those are the only two? Is that right now, Mr. Witness?

A. Yes.

Q. All right. Now, when was the first time that you made any complaint or any suggestion to either the Captain or the First Mate that they radio to some hospital for information concerning your hand? What was the first date?

A. It was the third day after I reported the accident to the Captain.

Q. That was the third day after you reported the accident to the Captain?

(Testimony of Otto Clavel.)

A. No, it was the third day after the accident happened, and my hand was so bad—I reported the accident to the Captain then.

Q. You reported the accident to the Captain first?

A. First, and then naturally I have to go to the Mate, because [46] he is the medical officer.

Q. Then you went to the Mate. Did he send you to the Mate? A. Yes.

Q. He did. Did they make out a report regarding this, Mr. Clavel? A. Yes.

Q. Well, did you see them make out a report?

A. No, I didn't.

Q. You didn't see them make out any report, but you gave the information to the Captain or the Chief Mate, who? A. The Captain first.

Q. You gave it to the Captain. Do you know where the vessel was, the position of the vessel with respect to these various points on the chart here when you first asked the Master to radio for some medical aid?

A. Well, it must have been past Singapore.

Q. It must have been past Singapore?

A. Past Singapore.

Q. You just think it was, or is that your best recollection?

A. Well, that is the best—because, after all, the Boatswain has nothing to do with navigation.

Q. I see. The vessel was past Singapore when you pricked your finger, wasn't it?

A. No, it wasn't.

(Testimony of Otto Clavel.)

Q. Where was it with relation to [47] Singapore?

A. I remember that accident very clearly, because the Mate told me, "Boatswain, you go ahead and sew that awning as fast as you can, because tomorrow we go through the straits and the fellows are going to swelter on the poop deck." So he asked I finish the awning——

Q. The next day after that——

A. The next day we passed the Straits of Singapore.

Q. The next day you passed the Straits of Singapore. And it was two days after that that you first made the complaint? A. That is right.

Q. You passed Singapore on the 24th of April, and on the 25th and the 26th the vessel was opposite Padaran, is that correct, or French Indo China; do you know that? A. No.

Q. You don't know that. When was the next time you said anything to the Captain about getting any medical aid?

A. I told him from then on every day. I asked him every day, whenever I saw him.

Q. What did you say to the Captain?

A. Well, I asked him to do something about this hand. I would say, "Give me penicillin." He says, "I haven't got any." I says, "Well, you have a radio on board, it won't cost you a fortune if you call up a hospital somewheres and ask for instructions about the hand." Because the hand started to get all red, green and blue. I would say, "I have only one hand, [48] Captain."

(Testimony of Otto Clavel.)

He says, "The Mate is taking care of you."

Q. The Mate was taking care of you every day, wasn't he? A. Yes.

Q. And the Mate had you soaking that hand every two hours in hot water and Epsom Salts?

A. Yes.

Q. Now, what was the date they lanced that finger? A. It was around the 27th.

Q. The 27th? A. Yes.

Q. Could that have been the 28th?

A. No, the 27th.

Q. Are you sure of that?

A. It was the 27th.

Q. The day they lanced the finger?

A. Yes.

Q. And after they lanced it, the swelling went down, didn't it?

A. No—I think this finger now, this went down, this healed up (indicating).

Q. The soreness went down in the finger?

A. In the forearm. This finger here was still swollen up, and then the other finger started to get very swollen up, and the whole hand swole up and puffy. [49]

Q. In other words, it got puffy on the back of your hand from the proximal phalangeal joint to here?

A. It came clear from here (indicating), and that finger started to crook after that, it crooked more and more.

Q. Was the finger lanced again from the time

(Testimony of Otto Clavel.)

they lanced it to the time you got to Yokosuka?

A. No. This part drained very little.

Q. It was still an open wound, wasn't it?

A. This was healed up. He put some green stuff on it. Where he cut it, that healed up, but that part started to drain (indicating).

Q. When the vessel got to Yokosuka—what time did the vessel get there, incidentally?

A. About three o'clock in the afternoon.

Q. And they took you the following morning to the hospital? A. Yes.

Q. The Captain took you and several others up to the Navy Hospital? A. Right.

Q. And you were left there at the Navy Hospital, weren't you? A. Yes, sir.

Q. And they gave you penicillin treatment there? A. And sulfa.

Q. And the vessel was going to leave on the—on what day, do you remember? [50]

A. Three and a half days later.

Q. It was going to leave on the 7th, wasn't it? You went in the hospital on the 4th, and the vessel was going to leave on the 7th? A. Yes.

Q. And the Captain wanted you to stay in that hospital and get treatment?

A. The Captain never came to the hospital to see me. The only one who saw me was the Mate—in fact, the Mate didn't see me. They only sent a man down there, and I asked him to get me cigarettes, because I was out of cigarettes.

Q. You never saw the Captain? A. No.

(Testimony of Otto Clavel.)

Q. Didn't you see the Chief Mate?

A. I saw the Chief Mate there when he brought me there, and the Captain was there at the same time.

Q. The Mate took you to the hospital didn't he?

A. Yes.

Q. And he brought you back from the hospital, didn't he?

A. The Mate didn't bring me back, the station wagon of the United States—in fact, the Chief brought me back. The Mate was aboard when I got aboard.

Q. Didn't you tell the Mate, "Please don't leave me in this hospital; when the vessel leaves I want to go back to the States with you"? [51]

A. Well, I asked him in case there can be nothing done with the finger to let me go, but after I asked the doctor in the hospital, he say, "The only thing I can do with your hand—I can't cut"—I asked him to cut this open because it hurt so much, the puff. He says, "No, all I do with your finger, I cut it off here." I said, "I don't want to have it cut." /

Q. But you asked the Chief Mate to be sure to come and get you before the vessel left Yokosuka for the States?

A. Of course, because I was discharged.

Q. As a matter of fact, the doctors at the Navy Hospital wanted to keep you there and give you further treatment, isn't that right?

A. The Navy doctor at the ward say, "If you

(Testimony of Otto Clavel.)

don't want me to cut this finger out of here, I have too many patients here, I have to discharge you."

Q. So he discharged you; is that right?

A. Yes.

(Thereupon, an adjournment was taken until 2:00 o'clock p.m., this date.) [52]

Wednesday, March 22, 1950—2:00 o'Clock P.M.

Mr. Schaldach: If your Honor please, I have Dr. Mensor here. With your permission, may I put him on?

The Court: You may.

Mr. Schaldach: Dr. Mensor, will you take the stand, please?

DR. MERRILL C. MENSOR

called for the defendant, out of order; sworn.

Direct Examination

By Mr. Schaldach:

Q. Dr. Mensor, you are a duly qualified physician, licensed to practice in the State of California, in the City and County of San Francisco?

A. I am.

Q. And for how long have you been practicing your profession, Doctor?

A. Twenty-seven years.

Q. Doctor, do you specialize in any particular branch of medicine? A. Orthopedic surgery.

Q. Will you state your qualifications, Doctor,

(Testimony of Dr. Merrill C. Mensor.)

the medical societies you belong to, hospitals you serve?

A. I am Associate Professor of Orthopedic Surgery at Stanford University; I am Chief of the Orthopedic Department of [53] Mary's Help Hospital, San Francisco; I am Past President of the Western Orthopedic Association, fellow of the American College of Orthopedic Surgeons, Member of the American Academy of Orthopedic Surgeons, Chief of the Orthopedic Staff at Laguna Honda.

Q. Doctor, at my request did you examine Mr. Clavel? A. I did.

Q. On how many occasions?

A. Two occasions.

Q. Will you state the dates on which you examined this man?

A. In November, 1948, and yesterday, March 21, 1950.

Q. November, 1948, and March of 1950?

A. That is correct.

Q. A little over a year elapsed between the first examination and the second examination?

A. Correct.

Q. Doctor, without going into the history at great length, will you tell us what the man gave you, briefly, in the way of history?

A. The man said he was at sea aboard ship, I believe it was the S.S. Picos, and he was working on a canvas awning when he stuck his finger with a needle, a canvas sewing needle. He paid no attention to it at the time, but continued to work on the

(Testimony of Dr. Merrill C. Mensor.)

awning, which was green colored, as I remember, and the green dye got in his finger. [54]

It didn't bother him at first, but as I recall two days later the finger got painful and swollen and he reported it to the Mate for care, the Mate acting as medical officer of the ship at that time.

The Mate applied ointment to it, laid him off duty, had him soak the hand several times a day in hot Epsom Salts, and finally an abscess formed—a collection of pus, let us say, in an area which the Mate opened and allowed to drain, continuing with the soaking until they arrived at a port in Japan where he was sent to the United States Navy Hospital, where I believe he reported for a day or two and treatment given him there. Then he went back aboard ship, the wound was still draining, and he was treated by the Mate from the time they left Japan until they docked in San Francisco.

He then reported to the Marine Hospital here for treatment, and treatment was continued along, let us say, conservative lines, trying to arrest infection and restore function of the finger for a couple of months, and finally it became apparent that although the infection quieted down that the finger would not be of very much use as far as function was concerned, and the finger was partially amputated in the Marine Hospital. When I saw him, the amputation stump had healed and—

Q. On November 1st, 1948, was the date you examined him first. Will you state what you found at that time?

(Testimony of Dr. Merrill C. Mensor.)

A. Yes. I found—it was his right hand, his major hand— [55] I found the right index finger had been partially amputated, so he had a residual stump of an inch and a half measured from the web of the finger to the end of the stump. The pad was well formed, the stump wasn't tender, and there wasn't any indication of any complication of amputation that we might find. In other words, I would say it was a very satisfactory stump as far as the finger was concerned.

As a result of the infection and the injury he had, he did have some limitation of motion in the middle finger of his right hand, and at the time I first saw him even his fourth and fifth fingers were a little limited from non use, so he couldn't quite bring his fourth and fifth to the palm. Of course, this stump could be brought down only partially, due to the loss of the finger.

He had a moderate loss of grip at the time. There was no particular tenderness and no particular loss of function other than I described.

In my conclusion of the case, I thought he no longer needed any further medical treatment. I thought if he used his hand he would regain some function, although he would have a limited disability, and I suggested in my report that the use of his hand in his occupation would be the best way to increase any function he would get subsequently and reduce any amount of disability that would eventually result.

Q. Doctor, do you know, or did he give you the

(Testimony of Dr. Merrill C. Mensor.)

date when the [56] amputation was performed?

A. As I recall, I think he said about two months after he came back to San Francisco. I don't remember the exact date.

Q. Do you have any recollection as to how many months prior to the time you first saw him, November 17, 1948?

A. I couldn't tell you definitely. I have forgotten those dates.

Q. At the time you examined him on November 17, 1948, what was your opinion at that time with respect to his ability to return to work?

A. Well, as I just said, I felt that the man could work, having a definite disability, but he could return to work and work would do more to decrease his disability than any other factor that could be done, and I would say when I saw the man in November that he was fit for duty.

Q. Oh, incidentally, Doctor, did you serve in the Medical Corps of the United States Navy during the last war?

A. I am still under it. I served four years. I happened to be a Captain in the Navy.

Q. You examined the man here the other day?

A. I did.

Q. And with respect to what you found on November 17, 1948, will you compare those findings with the findings that you ascertained here the other day?

A. Well, the other day I found that the man had certainly followed my advice in regard to using

(Testimony of Dr. Merrill C. Mensor.)

it, because when I [57] contrasted measurements of the circumference of the arm and forearm with the measurements on the first examination, the sizes of the muscles had definitely increased, showing the man had actually used his hand.

As regards the limitation of motion, there was no marked increase in motion, except there was no trouble in my examination yesterday in his bringing his fourth and fifth fingers to the palm. His middle finger still missed his palm by exactly the same as it was before. In other words, about one inch.

When he flexes, his grip was not materially increased. I would say the man has a permanent moderate loss of gripping strength in his right hand.

Q. Incidentally, Dr. Cox estimated that at 25 per cent—rather, he said it was 35 per cent—inasmuch as it was his major hand, he estimated his loss of grip at about 35 per cent.

A. I think that would be a fair estimate.

Q. What were the complaints he made to you on your last examination with respect to his hand?

A. The man had very few complaints in my examination of yesterday. He told me he returned to sea on March 2nd of 1949 with the rating of Boatswain, and he carried on successfully and did the job quite well. The only thing that bothered him was, particularly in cold weather, the stump ached and the [58] middle joint of the middle finger ached, that he still didn't feel that he had as good a grip in that hand as he had before the accident.

(Testimony of Dr. Merrill C. Mensor.)

Regarding the grip, I think that is quite true. Regarding the aching, I think we can explain that on the fact that it sometimes takes several years even before they lose some of these tender sensations they have. The circulation has to re-establish itself, and in extremes of temperature—sometimes the blood vessels haven't come back to normal and they don't give the full supply, and they get a little aching, particularly in cold weather.

Q. (By the Court): You expect that to improve?

A. I do, I expect that to improve. On the other hand, we find amputees that complain indefinitely they feel an aching in their stump in cold weather, and, of course, we find people with arthritis who say they can tell the change of weather from the way their joints feel, but the majority of medical experience indicates that that will improve.

Q. (By the Court): How about the grip? Do you think there will be any improvement in the grip?

A. No, I think that is permanent, your Honor. The man has used it over a year and a few months and it has been over a year since it was amputated. and I think the estimate that Dr. Cox gave of 35 per cent loss of grip is a fair estimate, and that it is permanent. [59]

Q. (By the Court): As I understood, you testified that after your first examination the work had decreased his disability?

A. I did. As a matter of fact, it decreased it,

(Testimony of Dr. Merrill C. Mensor.)

but there was no marked improvement in the grip as far as I could determine from the instrument, and I think the man was giving his best effort.

Q. (By the Court): You said something about the fourth and fifth fingers, he couldn't bring those to the palm of his hand?

A. On the first examination, no.

Q. (By the Court): Can he now?

A. Yes, he can, but his middle finger is not improved.

Q. (By the Court): There is that definite improvement?

A. Yes. In other words, the hand lumps up (demonstrating).

Q. (By the Court): Doesn't that improve the grip somewhat?

A. One would assume so, but there again we have a gripping machine, and I am assuming this man gave me his best effort, and I have no reason to believe he did not, so although the motion should improve so far as indications go, there was very little change, so I would assume there has been no material improvement in the grip, and since he has gone back to work using his hand the length of time he has since his amputation and the thing remains fairly stationary, I would feel—well, optimistically he might increase his gripping power five or ten per cent or more, but he will certainly have a variable [60] between 25 and 30 per cent loss of grip.

Q. (By Mr. Schaldach): Now, Dr. Mensor, with respect to this thing that is called a causalgia

(Testimony of Dr. Merrill C. Mensor.)

factor—Dr. Cox this morning in his testimony made some reference to that factor.

A. A causalgia factor?

Q. A causalgia factor.

A. A causalgia is a blood vessel and nerve pain. It is a definite reference pain. It is usually projected through the stump and down where the member was before it was amputated, and this man has no signs of a true causalgia. I think that his ache he has is along a blood vessel basis, but that is not a true causalgia.

Q. Doctor, when you examined this man the other day, did you ask him if he had been working?

A. Yes.

Q. And did he tell you he had been?

A. Yes, he told me he went back to sea March 2d, 1949, and the only difficulties he had were those I have given, and from his description to me, I assumed that he had been working and is working right up to now. He may be laying off a cruise on account of this litigation matter.

Mr. Gay: Pardon me, what is that?

The Court: The doctor said he assumed he had been working and is working right up to now.

Mr. Gay: I ask that be stricken. [61]

The Court: It may go out.

Q. (By Mr. Schaldach): Do Mensor, from your examination the other day is there any reason why this man cannot continue working?

A. None whatsoever. In fact, he could have worked, in my opinion, in November, 1948, when

(Testimony of Otto Clavel.)

I saw him.

Q. And, as you said, he has improved somewhat from the date of that examination?

A. That is right.

Q. Now, Dr. Mensor, assuming that a seaman aboard a vessel on March 5, 1948, had an infection of the finger, the index finger of his hand——

The Court: What date?

Mr. Schaldach: On March—on April the 25th, your Honor, I beg your pardon, I am getting the three and four mixed up—on April 25, 1948.

The Court: I believe his testimony was it was April 23, if you want to be accurate.

Mr. Schaldach: Well, your Honor, I am going to submit proof on my case to conform with my facts.

The Court: Very well.

Q. (By Mr. Schaldach): On April the 25th, 1948, a seaman aboard a vessel, a tanker, came to one of the mates who was the designated medical officer in charge of that vessel with an infection in one of the fingers of one of his hands, and at that time the mate prescribed hot Epsom Salt treatments, [62] there being no penicillin or sulfa aboard the vessel, and that thereafter on the following days, the 26th and 27th of April the same treatment was carried out, and on the 28th of April the infection came to a head and it was lanced, and hot Epsom Salts treatments were continued on that day and the following days up to May 3rd, when the vessel arrived at port, and the infection which was in

(Testimony of Otto Clavel.)

the finger of one of the hands was such that it became localized on the back of the hand and in the finger that was injured and some portion of the arm.

In your opinion, Doctor, in the absence of penicillin and sulfas aboard that vessel, would you say that that was the proper treatment afforded this man?

A. I would. I would say he did everything he could do.

Q. Now, Doctor, further assuming that you were attached to a hospital in—say one of the Naval Hospitals in Japan, and a vessel proceeding toward that port radioed the hospital at which you were the chief doctor, and upon the same state of facts asked your opinion on April the 28th, at the time they drained and dressed his hand as to what would be the course of treatment, what would your answer be?

Mr. Gay: Well, now, if your Honor please, I object to that. It is patently improper. In the first place it doesn't state the facts correctly as brought out and as the record must show, and it asks the doctor to assume if you were in Japan. Now, that is immaterial where they are. If the question [63] is proper at all, it is just a question of what is the proper medical treatment.

The Court: I think so. Of course. I will receive this and permit the doctor to give his answer to that upon the assumption that counsel will prove the facts which are the basis of the hypothesis. If he does not, it is subject to a motion to strike.

(Testimony of Dr. Merrill C. Mensor.)

Mr. Schaldach: Yes, your Honor, that is a basis on which it is offered.

The Court: Of course, the second objection is good, that it doesn't make any difference whether it was in Japan or wherever it was.

Q. (By Mr. Schaldach): Let's assume for the purpose of that hypothetical question he was in the immediate vicinity of land in a hospital and he received a radiogram from the vessel.

Mr. Gay: I think the form of the question is improper.

The Court: Overruled. With the qualification I have made my ruling on, what would be the treatment you would direct under those conditions?

Q. (By Mr. Schaldach): By return radio or wire.

A. I think with the facilities that are available aboard ship I would prescribe treatment such as was given. There was nothing else available under the circumstances.

The Court: You said under those conditions you would consider that treatment appropriate? [64]

A. That is right.

Q. (By Mr. Schaldach): Now, assume, Dr. Mensor, that on April the 25th, 1948, a seaman aboard a vessel approaching Japan in the China Sea reported to the Mate that he had an infection of his finger on the right hand and that he was afforded treatments of Epsom Salts and hot water treatment on the 26th, 27th, 28th, 29th, and 30th of April, and on March 1st, 2nd, and 3rd—on May 1st,

(Testimony of Dr. Merrill C. Mensor.)

2nd, and 3rd the hand was dressed and bathed with hot Epsom Salts, and during the period of time from April 25 to May 3rd, 1948, the man was given on one occasion—he was given on one occasion phenobarbitol, would that have any significance or mean anything to you?

A. Yes, it would mean to me that the general condition of the patient was such that I would not consider him seriously or dangerously ill, that he did not have a tremendous amount of pain, because phenobarbitol is a sedative, not a pain killer, and assuming they had pain killers aboard the ship I would assume further that the man in charge of the medical thought that the man had sufficient pain he would give him something for the pain.

Mr. Schaldach: And assuming the same set of facts, and assuming, Doctor, that he was given the phenobarbitol on two occasions, one on April 27 when his hand was lanced and the following day he was also given phenobarbitol, on those two [65] occasions and those two alone and not thereafter, would that have any significance to you?

A. Yes, that the man did not need either sedation or any medication for his pain. Otherwise I would assume, as I stated, if pain medication was available, if it was needed it would have been given.

Mr. Schaldach: That is all. You may cross-examine.

(Testimony of Dr. Merrill C. Mensor.)

Cross-Examination

By Mr. Gay:

Q. Doctor, you came here to testify as a professional witness, didn't you?

A. I came here to give the benefit of my opinion, because I had examined this patient at the request of Mr. Schaldach.

Q. All right, but you came here as a doctor?

A. That is right.

Q. All right, now, what right have you to assume from the mere statement to you that the man was only given phenobarbitol once that he wasn't in pain? Isn't it just as consistent to assume that he was in pain and that he was neglected?

Mr. Schaldach: Well, now, just a moment, your Honor, I will object to the question in that form as being argumentative.

The Court: Overruled.

A. Shall I answer?

The Court: Yes.

A. I would assume that a man who would have enough [66] intelligence to give a patient hot Epsom Salts and to incise an abscess when it was there, to see the man once or twice every day, would not be of such a character that he would neglect a patient.

Mr. Gay: I see. In other words, you are coming here to testify on behalf of the steamship company, and you are giving all of the assumptions in favor of the correctness of the treatment?

A. Mr. Gay, I am simply answering hypothetical questions to the best of my ability. I expect to be

(Testimony of Dr. Merrill C. Mensor.)

paid for my testimony just like your medical witnesses expect to be paid for theirs.

Q. I didn't ask you that.

A. If your Honor please, he is arguing with me, and if his Honor will rule one is argument, I will answer the question.

Q. Very well. You apparently do not require very much invitation before you express an opinion.

Mr. Schaldach: Well, now, your Honor, I will ask that go out.

The Court: It may go out.

Q. (By Mr. Gay): As a matter of fact, if the facts were that in the absence of morphine or barbitol that he was taking his own aspirin at his own room and using it himself in order to relieve the pain, if that is a fact would that modify your opinion any? [67]

A. If a man was taking aspirin to stop pain on his own, I would say that the man had pain certainly.

Q. Well, do you think that the factor of pain is important in determining the severity of injury?

A. I think pain is a very definite factor relative to severity.

Q. And if it is a fact that the man was suffering from severe pain to the extent that he could not sleep, then that would indicate to you that it was of some severity? A. Yes.

Q. Now, Doctor, in Mr. Schaldach's question he asked you about infection and so on, and you said with the infection as he described it to you that the

(Testimony of Dr. Merrill C. Mensor.)

treatment was all right. If it were the fact that after the first day or two the finger—the index finger swelled up to twice its size and that the hand itself became puffed up, discolored, it was red and green and yellow, and also further assume that that swelling continued up into the forearm, wouldn't you think that that would indicate a serious condition that would need treatment?

A. I would think, if a man had all those things, we might even anticipate gangrene. I can't from my knowledge of what I gathered from examining this man and taking the history conceive that he had a lot of discoloration, red, yellow, and green as you describe it. I can visualize a medical patient that would have a cellulitis or would have swelling [68] of his hand somewhat generally, and it may even proceed somewhat up the forearm.

Q. I have asked you to assume, Doctor, that it was a fact that his hand was in the condition I have described. Now, if that were a fact——

A. I would say it was a serious condition.

Q. It would be a condition that you as a doctor would not think could properly be handled by merely soaking it in Epsom Salts; isn't that true?

A. Yes.

Q. And further, Doctor, in the question that was asked you, that was put to you, in the absence of penicillin or sulfa drugs whether the treatment given was proper—now, penicillin or sulfa drugs would have been a very good thing to have at that time, wouldn't it?

(Testimony of Dr. Merrill C. Mensor.)

Mr. Schaldach: Just a minute, your Honor, I will make an objection to this on the ground it is incompetent, irrelevant, and immaterial. It has been testified here that there was no penicillin or sulfa on that vessel, and with respect to that, your Honor, the case of Johnson vs. American President Lines sets down what the rule is in these cases, and it is what under the circumstances the Mate or Captain on the vessel did, and not what they didn't do.

The Court: Well, under the circumstances that covers quite a little territory, Mr. Schaldach. I think it is [69] appropriate to go into this. Under those conditions would penicillin have been something that should have been used, if it had been available?

A. I would say if it had been available they certainly should have been used, yes.

Q. (By the Court): And at that time, at the time of the accident, in April, 1948, how generally was penicillin used and how accessible was it?

A. Well, penicillin was not as widely used a year and a half or two years ago as it is now. It was quite available. Sulfa drugs, however, were very easily obtained. Penicillin, of course, had to be given by injection, which added a definite hazard.

Q. (By the Court): Well, in the absence of penicillin and sulfa drugs were available, would it have been appropriate to use sulfa drugs?

A. Yes, it would, your Honor.

Q. (By Mr. Gay): And assuming the hand was in the condition that I have described and that a

(Testimony of Dr. Merrill C. Mensor.)

Mate or Captain of a vessel did not feel competent to administer that sulfa, wouldn't it have been advisable to get the patient to someone who could administer those drugs? A. Is that a question?

Q. Well, never mind.

The Court: I think the answer is in the question. [70]

Q. (By Mr. Gay): Doctor, you stated that when you examined Mr. Clavel in March of 1950, which was only yesterday, by the way, he told you that the pain—that the hand, his right hand, the stump and the finger ached a little in cold weather. Now, as a matter of fact, didn't he tell you that it became very painful in cold weather?

A. No, he didn't. He told me exactly what I said, that it ached a little, and my memory is very vivid in twenty-four hours.

Q. Did you make any notes of what he told you?

A. I did.

Q. Do you have them on you?

A. I do in my office in the dictating machine, if you would like to come and listen to them.

Q. Didn't he tell you that his hand aches in cold weather, that he just can't endure it, can't work with it?

A. No, he didn't. He told me he carried on his duties as a Boatswain very successfully.

Q. Carried on his duties as a Boatswain very successfully. But in cold weather did he tell you that?

A. He told me he had no difficulty at sea with

(Testimony of Dr. Merrill C. Mensor.)

the hand, other than the symptoms that I described.

Q. Did he tell you he had been working in cold weather since——

A. Yes, he told me he had been at sea since March 2nd, 1949. That is in cold weather. [71]

Q. Did you assume that since March 2nd, 1949, when he went back to work to the present time that he has worked in cold weather? A. I did.

Q. You are assuming that?

A. That is right.

Redirect Examination

By Mr. Schaldach:

Q. Dr. Mensor, Mr. Gay has described to you the condition of a man's hand hypothetically as being swollen and the arm being swollen, and that the hand and the arm were red, blue, and some other color, I don't recall what the other color was, what kind of a condition would that be, Doctor, if the hand were red, blue, and green?

A. Well, as I said, it would suggest to me from that description that that hand might have become gangreneous.

Q. And assuming, Doctor, if that condition were such on April—or, rather, three days after the original prick of the finger and the man stayed aboard the vessel for a period of eight days, would you expect that he would have lost his hand or his arm if that condition had existed on that day nine days before the termination of the voyage?

(Testimony of Dr. Merrill C. Mensor.)

A. I would expect he might not be with us.

Mr. Schaldach: That is all.

Recross-Examination

By Mr. Gay:

Q. All right, Doctor, the testimony is and the [72] record will show that the Mate of the vessel cut Mr. Clavel's hand to let out the pus on the 27th day of April, 1948, which was about seven or eight days before he reached the hospital, and I am going to read you the testimony from the testimony of the Mate himself, Mr. Coward, which will be read in evidence, as follows—

Mr. Schaldach: Now, just a minute. Your Honor, I will object to any questions based upon questions asked of doctors based upon the testimony of what one of the Mates or someone else stated there. He can put it in the form of a hypothetical question, but not reading from the testimony.

The Court: Overruled. It will be understood that the hypothesis is based on the statement about to be read.

Q. (By Mr. Gay): All right. Assuming this is the testimony and assuming that it is true:

“When that drew to a head I cut it, I lanced it, that took the swelling out of his arm and got rid of all of that pus out of his hand, and on the back of his hand. His hand had started to turn green and yellow on here.”

Now, assuming that the Mate who treated him testified himself that it was green and yellow—

The Court: Assuming that is the fact.

(Testimony of Dr. Merrill C. Mensor.)

Q. (By Mr. Gay): Yes, and assuming that is the fact, do you wish your statement to Mr. Schaldach to stand that with a hand [73] of that color you are surprised that he is still with us?

A. My statement still stands. I think that due to the lack of technical medical knowledge that was a layman's description of how the thing looked.

Q. Yes. You were taking the—you were basing solely on the description of the hand as being green and yellow, and you said, did you not, that if the hand was in that condition at that time and he wasn't hospitalized for a week after that you are surprised he is still with us, did you not?

Mr. Schaldach: Just a minute. Your Honor, I added the further facts that the hand was swollen, that the finger was swollen, that the arm was swollen, that the arm and the hand was green, black, and blue.

The Witness: If you Honor please, for your edification, it is not a jury——

Mr. Gay: If the Court please——

The Court: If he wishes to amplify the answer, I will permit him.

The Witness: May I? I think my answer still remains unchanged to both questions, both Mr. Schaldach's and Mr. Gay's, because there is an assumption here by a non-medical person of how a thing looks, and they are asking me a medical opinion if that were actually true. Now, if that were actually true, it would be dangerous; but seeing

(Testimony of Dr. Merrill C. Mensor.)

non-medical descriptions of how things are, it is very much open to question. [74]

The Court: I understand you. Go ahead. Anything further?

Mr. Gay: I have nothing further.

Mr. Schaldach: Nothing further.

The Court: That will be all, Doctor. Now, the Libelant will resume the stand.

OTTO G. CLAVEL

the Libelant, resumed the witness stand.

Cross-Examination

(Continued)

By Mr. Schaldach:

Q. You said, Mr. Clavel, that when you went aboard the vessel on May the 7th after it left Japan, and prior to that time that the doctor at the Naval Hospital had given you a supply of sulfa——

A. Right.

Q. Is that correct? A. That is correct.

Q. And did he give it to you personally, or someone else?

A. He gave it to me personally.

Q. And were they in the form of tablets?

A. They were in the form of tablets.

Q. And he told you to take one a day?

A. No, I had to take four every four hours.

Q. Four every four hours? He gave you instructions to take four every four hours? [75]

A. Yes.

(Testimony of Otto G. Clavel.)

Q. Do you know whether or not the Doctor talked to either the Master or the Chief Mate?

A. No, he didn't talk to them.

Q. You don't recall that?

A. No, because none of them were ever in the hospital.

Q. Did you bring back any sulfa or instructions with you to give to the Captain or the Mate that you have received from the doctor?

A. Yes, I did. I gave the medical abstract to the wireless operator, because he was the clerk aboard the ship, and he told me he was going to give it back to me, but he never did.

Q. My question is this: Did you ever receive any instructions as to the care of that finger or your hand from the Navy Hospital which they told you to give that particular instruction or instructions to the Master or the Mate?

A. No, I didn't.

Q. They told you themselves—that is, the Navy Doctors told you themselves what course you were to follow in the taking of the sulfa drugs?

A. That is right.

Q. Told you alone, no one else?

A. That is right.

Q. Did you tell the doctors there, or anyone in Japan connected with the Naval Hospital that you didn't want to stay [76] there, that you wanted to go back to the States on the Picos?

A. After the doctor told me he was going to cut my finger off.

Q. After he told you he was going to cut your finger off, then you took off?

(Testimony of Otto G. Clavel.)

A. I told him in that case I want to go home and try to save my finger.

Q. And you knew, didn't you, that you were taking a certain risk in going home with your hand in the condition it was?

A. That is right, but I asked the doctor how much risk I would take. He said, "If you take the sulfa drugs and ask them for penicillin, I am sure you will reach San Francisco or Pedro or the United States."

Q. You knew you were taking a risk, though, in doing that?

Mr. Gay: Asked and answered, if your Honor please.

The Court: Yes.

Q. (By Mr. Schaldach): Now, when you got to San Pedro, Mr. Coward asked you to go to the hospital down there, didn't he? A. Yes.

Q. When did the vessel get to San Pedro?

A. Saturday afternoon.

Q. Saturday afternoon?

A. Somewhere on Saturday afternoon.

Q. Do you recall what the date was? May the 20th, would that be the date? [77]

A. No, May the 22nd—no, let's see—the 25th I paid off.

Q. You paid off the 25th? A. 25th.

Q. Didn't you stay around San Pedro for three or four days? A. That is right.

Q. What is that?

(Testimony of Otto G. Clavel.)

A. That is right. We arrived Saturday. There is no hospital in San Pedro, only a little infirmary, so I couldn't go there Saturday, I couldn't go there Sunday, and Monday they fumigated the ship and I had left my slip aboard and I couldn't go back aboard the ship.

Q. They gave you a slip to go to the San Pedro Marine Hospital?

A. There is no San Pedro Marine Hospital, there is only an infirmary. They send you from there to Pasadena.

Q. They sent you from there, but you didn't go to the Marine Hospital there?

A. There is no Marine Hospital there.

Q. Did you go to the infirmary?

A. No, because we came in Friday, Saturday it was closed, Sunday it was closed, and Monday I couldn't go because they were fumigating the ship, so I couldn't get my slip, and Tuesday I paid off and decided to fly home so I would be with my family.

Q. Did you have any conversation with Mr. Coward, the Chief [78] Mate, about your finger after you arrived in San Pedro?

A. Yes, I did. I thanked him for what he did to my finger, he did the best he could, because he wasn't a doctor.

Q. In other words, you thanked Mr. Coward for what he did to your finger on board the ship?

Mr. Gay: He started to add to that the qualification that he not being a doctor——

(Testimony of Otto G. Clavel.)

Mr. Schaldach: Now, just a moment——

Mr. Gay: That is what the witness said.

Q. (By Mr. Schaldach): How long did you remain in the Marine Hospital in San Francisco the first time? A. Twenty-one days.

Q. When did you first go to the Marine Hospital?

A. The same day after I arrived I went up there, and they told me to be back the next day.

Q. They told you to be back the next day?

A. Next day.

Q. And you stayed in there twenty-one days?

A. Twenty-one days on penicillin treatment.

Q. Then you were on out-patient status for awhile?

A. I was out-patient status for thirty days for therapy, and my hand was stiff and I couldn't move my finger.

Q. Now, what was the date your finger was amputated?

A. It was, to the best of my recollection, the 14th or 15th of August. [79]

Q. August the 14th or 15th. And how long did you remain in the hospital then?

A. Three days.

Q. You were on out-patient status after that?

A. After that.

Q. You saw Dr. Wagner of the Marine Hospital after that?

A. Well, Dr. Wagner was too busy, I only saw his assistant.

Q. Well, you saw him on occasions, didn't you?

(Testimony of Otto G. Clavel.)

A. Well, I saw Dr. Wagner, but he was so busy that time they had to take the stitches out, they took them out in three sittings.

Q. When did the doctors at the Marine Hospital give you your fit-for-duty discharge slip?

A. After they took the stitches out.

Q. How long after?

A. Well, it say on the discharge slip, "Twenty-one days after fit-for-duty."

Q. You received a discharge slip, didn't you?

A. Yes.

Q. In October, 1948? A. Yes.

Q. Saying you were fit for duty October 1st, 1948?

A. Twenty-one days from that discharge.

Q. Yes. You received that? A. Yes. [80]

Q. You didn't go back to the Marine Hospital after that, did you? A. No.

Q. After you received your discharge and "fit-for-duty" slip, you didn't go back to the Marine Hospital after that for any treatment? A. No.

Q. That is right; isn't it? A. That is right.

Q. You didn't go to any other doctor for treatment after you left the Marine Hospital and received that "fit-for-duty" discharge slip; is that correct?

A. I didn't see any other doctors.

Q. That is what I mean, you didn't go to any other doctor for treatment? A. No.

Q. And you testified here, I think, that you went back to work on March the 3rd?

(Testimony of Otto G. Clavel.)

A. March 2nd.

Q. And you worked on that vessel, the Mission Dolores? A. Dolores.

Q. —for nine months, and you got off some-time in December?

A. Twenty-eighth of December.

Q. And the people that hired you are the same people who are defendants in this action, aren't they, the Pacific Tankers, [81] Division of Joshua Hendy Corporation? A. That is right.

Q. Mr. Clavel, do you have with you your pay voucher for the voyage aboard the Mission Dolores, the ten-month's period? A. Yes.

Q. May I see it, please? A. (Producing.)

Q. In other words, you made during the time—during the year 1949, the only employer you had was the Pacific Tankers, Division—

A. That is right.

Q. —of Joshua Hendy Corporation?

A. Yes.

Q. Did you work on two different vessels, Mr. Clavel?

A. No, they are just two different documents.

Q. They are two different documents. It shows that you earned \$4,158.25 from which there was deducted \$478.35 for withholding tax? A. Yes.

Q. And you made an additional \$629.10 from which was withheld \$72.00; is that right?

A. Yes.

Q. Did you injure your hand, or re-injure your hand on the Mission Dolores? A. No. [82]

(Testimony of Otto G. Clavel.)

Q. Nothing happened that you hurt your hand or your finger? A. No.

Q. At any time on this voyage on the Mission Dolores? A. Never did.

Q. Did you injure yourself in any way?

A. No, I never did.

Q. I mean, that would incapacitate you from working? A. No, I didn't.

Q. You say that you were fixing up these sail hooks to put this canvas over the poop deck where they would steer the vessel, because the steering engine was broke? A. Yes.

Q. In other words, the poop deck is the after part of the vessel; isn't it? A. That is right.

Q. And there is an auxiliary steering engine there, or steering apparatus? A. A wheel.

Q. A wheel? A. A steering wheel.

Q. The vessel is ordinarily operated from the bridge, which is on the forepart of the vessel and looks right over the bow; isn't that right?

A. Yes.

Q. Now, do you know whether or not they were operating this [83] vessel from the time the vessel came through Singapore until it arrived at Japan from the poop deck steering wheel or from the bridge?

A. I couldn't say if they operated it all the way into Japan, but they operated it for quite awhile.

Q. They used it for quite some time?

A. It might have been until they got to Japan, but they were operating the vessel through the

(Testimony of Otto G. Clavel.)

three or four days or five days after they left—after it came about Singapore and started up the China Sea from the poop deck.

Q. From the rear steering wheel?

A. Yes.

Redirect Examination

By Mr. Gay:

Q. Now, Mr. Clavel, the statement marked Respondent's Exhibit A that has been offered in evidence, statement signed by you, taken by Mr. Hall, I am going to read this and ask you to comment on one or two matters here——

Mr. Schaldach: I offered this for the purpose of impeachment only.

Mr. Gay: I don't care for what purpose, it is in evidence. You haven't read it, and I am going to.

Mr. Schaldach: Very well.

Mr. Gay: "I, Otto G. Clavel, sixty years of age, married, with no dependents,"——

Well, is your wife your dependent? [84]

A. Yes.

Q. You mean no other dependents other than your wife? A. No.

Q. Is that what you mean?

A. That is what I mean.

Q. "Residing at 8 Seymour Avenue, Mill Valley, California, after first being examined and found fit for duty, signed foreign articles as Boatswain at \$275.00 per month on February 10, 1948, at Oakland, California, on the U. S. N. T. Picos."

(Testimony of Otto G. Clavel.)

Now, you stated before your base pay was \$250.00 a month I believe?

A. Well, in the meantime we got a raise. I forgot about this raise. It was a \$25.00 raise.

Q. So it was \$275.00? A. 275.00.

Q. "On or about April 24, 1948, at about 10:00 a.m. while the vessel was at sea en route from the Persian Gulf to Japan, and while engaged at the direction of the Chief Officer in sewing canvas for an awning to protect the crew who were required to steer the vessel from aft, due to the fact that the steering wheel gear had broken down, I sustained a laceration of the forefinger of my right hand from the sharpened end of a nail which I had filed down to make a hook by means of which to suspend [85] the awning. This nail was one of several new ones which I had obtained from the carpenter and was without defects."

Now, your statement in the libel, in the pleadings, was that you were injured on April 22, and your statement in this statement was that you were injured on April 24, and your statement in court here has been that your injury was on April 23. Now, at the time that you made this statement to Mr. Hall, did you have any memorandum before you as to the exact date? A. No, I didn't.

Mr. Schaldach: If your Honor please, I will submit that this examination is attempting to support his own witness here——

The Court: He is attempting to reinstate him. Proceed.

(Testimony of Otto G. Clavel.)

Q. (By Mr. Gay): Did you have any memorandum, any notes?

A. No, I didn't have any memorandum.

Q. Did you have any calendar before you at the time? A. No, not at the time.

Q. Well, now, you have testified here that the injury you are now quite sure was Friday, April 23, 1948, and how did you arrive at that date?

The Court: You went into that. He looked at the calendar.

Mr. Gay: All right.

Q. (Continuing with the statement): "Without reporting this incident to anyone, I washed the finger and looked [86] around for a band-aid, but as I was unable to find one, I continued my duties and finished the job of sewing the canvas in question."

Now, you testified in court here this morning that you did have a band-aid, but the statement in here is to the effect you were unable to find one. Will you explain to his Honor what the circumstances were?

A. I couldn't find any band-aids in the hospital, so I went to my own room and I had a few band-aids left of my own, and I put those on.

Q. How long were the band-aids you had?

A. They were small ones.

Q. How many did you have to put on there?

A. Two.

Q. So you did put band-aids on?

A. I put my own band-aids on.

Q. It is also true that you looked around for a band-aid and were unable to find one?

(Testimony of Otto G. Clavel.)

A. There was none aboard the ship.

Q. In the hospital?

A. In the hospital.

Q. "My finger seemed to be in satisfactory condition for a period of about three days, but at the end of that period it began to swell."

Is that correct? [87]

A. No, that is not correct, because the second day my finger—I remember it very well, because I told the Mate in the afternoon, "I can't work the overtime, my finger hurts me too much." That was the second day after that happened.

He says, "Well, if you don't get any better, come back tomorrow morning and tell me tomorrow morning. It might get better overnight."

Q. And you did go to him on the third day?

A. Yes, then I reported to him after reporting to the Captain.

Q. "I attribute this solely to the finger's having come in contact with the green coating which was on the canvas. This green coating is some sort of protective chemical to preserve the fabric. This canvas was Navy war time material. It was taken on board the vessel at Oakland prior to sailing on the voyage in question.

"When my finger began to swell, I reported to the Chief Officer who was in charge of the medicine chest. After examining the finger, he instructed me to bathe it in Epsom Salts solution. I knocked off all duty in order to better take care of my finger. It continued to swell, and the Mate decided to lance it,

(Testimony of Otto G. Clavel.)

which he did. This lancing produced no effect except to the effect of draining some of the pus from the finger. I continued to bathe the finger in Epsom Salts solution, [88] but there was no improvement. In fact, prior to the vessel's arrival in Japan, the finger began to crook inward toward the palm.

“Upon arrival of the vessel at Yokosuka, Japan, the Mate took me to the Naval Hospital, where I was confined for a period of about three and one-half days. The doctor at the hospital wanted to cut my finger off, but I refused to give my permission. I was sent back to the vessel and completed the voyage. On the return voyage there was not much improvement in my finger. I was not required to turn to, but I voluntarily did so in a supervisory capacity as Boatswain, and I performed no work requiring the use of my right hand. I continued to bathe the finger in Epsom Salts solution until the vessel ran out of salts, after which I used ordinary salt water.

“On May 24, 1948, I paid off the vessel with the remainder of the crew at San Pedro, California, receiving all money due me. I signed off the articles under protest because of the condition of my finger, which, by that time, had assumed a right angle crook.

“On May 28, 1948, I reported to the San Francisco Marine Hospital, where I was confined to June 18, 1948, my discharge of that date indicating ‘improved—discharged—not fit for duty—return daily to P.T.’ [89]

“Incidentally, while serving as Boatswain on the

(Testimony of Otto G. Clavel.)

S.S. Mission San Fernando during March, 1946, and while tying up the ship I was hit in the head by the ball of a heaving line which was being thrown to the dock at San Pedro, California. During that voyage I suffered also from a slight deafness of the left ear. I sought no medical attention for the head blow or the ear condition, and I have at no time since my service on that vessel suffered any ill effects from either condition.

"I have read the foregoing, which is true, correct, and complete in all particulars. Dated: San Francisco, California, June 22, 1948. Signed: Otto George Clavel; Witness: R. H. Hall."

Now, at the time you signed that on June 22, 1948, had you talked to me or any other lawyer?

A. No.

Q. And with respect to that injury on the Mission San Fernando, did you ever make any claim or get anything for that?

Mr. Schaldach: Objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained.

Q. (By Mr. Gay): Mr. Clavel, what was the weather at the time from, say, the 23rd to the 28th of April while the vessel was proceeding along its course? [90]

A. It was good.

Q. Was the sea smooth?

A. It was pretty smooth, yes.

Q. You heard the testimony of Dr. Menser that when you saw him yesterday you told him that your

(Testimony of Otto G. Clavel.)

finger in cold weather ached a little bit. Is that what you told him?

A. No, I told him the finger aches me so much in cold weather that I am not able to work properly.

Q. And is that true? A. That is true.

Mr. Gay: That is all.

Recross-Examination

Mr. Schaldach: I have a few more questions, your Honor. Take the recess?

The Court: Go ahead and finish.

Mr. Schaldach: All right.

Q. Mr. Clavel, on June 22nd of 1948 when you gave this statement to Mr. Hall of our office, didn't he ask you what complaints you had regarding the condition of your finger against the vessel or its operators?

A. Well, Mr. Hall offered me a settlement, and I said, "I can't accept the settlement now."

Mr. Schaldach: That is not responsive to the question. I ask that it be stricken.

The Court: It will go out. [91]

Q. (By Mr. Schaldach): Didn't you tell Mr. Hall on June 22nd, 1948, each and every complaint that you had against the vessel or its operators by reason of the fact that your finger was in this crooked condition?

A. I don't understand that question.

Q. Well, I will reframe it. When Mr. Hall talked to you in June of 1948, and when he took the statement from you, didn't he ask you what

(Testimony of Otto G. Clavel.)

complaints you had against the vessel, and asked you to enumerate everything that was wrong with the vessel or its crew or the officers of that vessel that might have caused your finger to become in a crooked condition?

Mr. Gay: If your Honor please, I am going to object to that. The complaint is on file here in the libel and he has testified to it. Whether he told them everything he could think of or not is immaterial.

The Court: What was the question?

(Question read.)

The Court: What did he ask you, what did Mr. Hall ask you? Did he ask you to enumerate all the complaints you had against the vessel on account of your finger being injured, in connection with the injury to your finger? Did he ask you to tell all the complaints you had against the vessel and the crew?

A. He asked me what complaints I had.

Q. He asked you to tell what complaints you had? [92]

A. He asked me to tell what I had against the vessel.

Q. (By Mr. Schaldach): And what you told him he put down here in the statement, didn't he?

A. No, he didn't put this down what I told him.

Q. Oh, did you tell him, Mr. Clavel, did you tell Mr. Hall that you had complained against the vessel because they didn't turn the vessel back

(Testimony of Otto G. Clavel.)

and go to Manila because of the condition of your hand on the 27th, 28th, and 29th of April? Did you tell Mr. Hall that? A. No.

Q. You never told him that. Did you ever tell him that the condition of your hand was such because the Captain or the Chief Mate did not radio some hospital asking for advice about your hand? Did you tell Mr. Hall that? A. No.

Q. Never told him that.

A. But I told him other things.

Q. You told him other things, but you didn't tell him either one of those two things, did you?

A. No, I didn't.

Q. Did you ever tell Mr. Hall when this statement was taken that you asked the Captain every day that you were on the vessel after you got your infection to turn the vessel back and go to some port so you could see a doctor or go to a hospital? Did you ever tell Mr. Hall that? [93]

A. I didn't tell Mr. Hall, because Mr. Hall didn't ask me.

Q. He asked you to tell all the complaints you had, didn't he? A. I told him.

Q. You told him, but you didn't tell him that, did you? A. No.

Mr. Schaldach: That is all.

Redirect Examination

By Mr. Gay:

Q. Mr. Clavel, did Mr. Hall ask you whether you thought you had gotten the proper treatment on the vessel?

(Testimony of Otto G. Clavel.)

A. No, I told him no, I didn't get the right kind of treatment.

Q. You told him that, did you? A. Yes.

Mr. Gay: All right.

The Court: That is all.

Mr. Schaldach: Your Honor please, I know Mr. Gay has not rested as yet, but I have present a witness who was the Second Mate aboard this vessel, who is now a student at San Jose State and is taking final examinations in the morning and his wife is going to have a child today or tomorrow——

The Court: Well, I think counsel is as sympathetic as the Court is for a man in those circumstances. Put him on.

Mr. Schaldach: It will be understood, your Honor, he is here out of order. [94]

CHARLES FRANKLIN GARDNER, JR.
called for the Respondents, out of order, sworn.

Direct Examination

By Mr. Schaldach:

Q. What is your full name, sir?

A. Charles Franklin Gardner, Jr.

Q. And how old are you?

A. Twenty-three.

Q. Do you hold licenses?

A. Second Mate License unlimited.

Q. Second Mate License?

A. Second Mate License unlimited.

Q. In other words, how long have you been

(Testimony of Charles Franklin Gardner, Jr.)

going to sea—strike that. Were you the Second Mate aboard the “S.S. Picos”? A. Yes, I was.

Q. That is a tanker? A. Yes.

Q. Prior to that time, how long had you been going to sea?

A. Prior to the time I joined the “Picos” I had been going to sea four and a half or five years.

Q. Four and a half or five years, and I assume in the course of the years you got your Third Mate and then the Second Mate license?

A. Second Mate license January 1st, 1947.

Q. Now, while you were aboard that vessel, the “Picos”—where did that voyage start? [95]

A. The voyage started at Moore’s Shipyard at Oakland.

Q. I will strike that. Do you recall one of the voyages—strike that. How many voyages were you on on the “Picos”?

A. I don’t recall off hand. I was on the vessel a year. I joined the vessel on the 18th day of January, 1948, and left it on the 9th day of July, 1949.

Q. You were on her for two or three voyages?

A. Four voyages, but one was a small voyage.

Q. Do you recall one of those voyages on which Mr. Clavel was present?

A. Yes, that is the first voyage.

Q. That is the one that started in January, 1948? A. Yes, sir.

Q. And that voyage started from San Francisco, or Moore’s Shipyard, wherever it was?

A. Yes.

(Testimony of Charles Franklin Gardner, Jr.)

Q. And finally arrived, I guess, at the Persian Gulf, right after leaving Yokosuka you went to the Persian Gulf and then you were on a return trip to Yokosuka? A. Yes, sir, that is right.

Q. Do you recall an incident aboard that vessel on the return voyage from the Persian Gulf to Japan when Mr. Clavel, the Boatswain, had an infected finger? A. Yes, I do.

Q. And do you know anything about the happening of the [96] accident, how he happened to do it?

A. I didn't see the accident myself. I only know from hearsay.

Q. Who was the medical officer aboard the vessel? A. The Chief Officer, Mr. Coward.

Q. Mr. Coward. And do you know how long—how old was Mr. Coward then?

A. I believe Mr. Coward was forty-one years old.

Q. As the medical officer aboard the vessel, just generally speaking, what were his duties, do you know?

A. Well, he took care of any of the fellows who were in need of medical assistance, such as cuts and bruises, venereal diseases, and just anything that came up.

Q. Now, when that voyage started, do you know of your own knowledge whether there were—strike that. Do you know whether or not that vessel contained or had a medicine chest or medicine cabinet aboard? A. Yes.

Q. And do you know of your own knowledge what

(Testimony of Charles Franklin Gardner, Jr.)
was in the medicine chest or medicine cabinet with respect to gauzes, tapes, ointments, or anything of that nature?

Mr. Gay: Wait a minute. I will object to that as no foundation laid.

The Court: Overruled.

Q. (By Mr. Schaldach): I mean of your own personal knowledge. [97] I am talking about the start of the voyage.

A. I checked the supplies aboard the ship.

Q. You did what? You checked them aboard the ship? A. Yes, into the hospital.

Q. And you checked the supplies from the ship into the hospital. A. Yes, in the ship.

Q. Just tell me to the best of your recollection what those medical supplies were.

A. They were a little of everything, from vitamin pills to bedpans.

Q. Was the vessel supplied with penicillin?

A. We did have a quantity of penicillin at the beginning of the voyage.

Q. Did you have any sulfa?

A. Yes, we had sulfa.

Q. Did you have any bandages? A. Yes.

Q. Gauze? A. Gauze, yes.

Q. Tape? A. Yes, tape.

Q. And any type of ointment?

A. Yes, there was Mercury ointment and Ichthymol and God knows how many other types, for various things. [98]

(Testimony of Charles Franklin Gardner, Jr.)

Q. Do you recall the incident of the Mate treating Mr. Clavel?

A. Yes, sometime after the accident occurred.

Q. And do you recall whether there was any penicillin or sulfa aboard the vessel at that time?

A. I am not really certain whether there was any penicillin there at the time. I think we did have some.

Mr. Gay: Well, wait a minute. Object to that, if your Honor please, what he thinks. I think he has already shown that he does not know.

The Court: Overruled. It is your best recollection that there was some there?

A. It is my best recollection, yes.

Q. (By Mr. Schaldach): I see. And do you know whether or not there were—any of the members of the crew during the course of that voyage were being treated for venereal diseases?

A. Several of them were.

Q. What treatment did they use for venereal disease aboard this vessel?

A. Penicillin when you have it, and sulfa when you don't, and sometimes one or the other. It depends.

Q. Do you know whether—did Mr Clavel ever talk to you about penicillin or sulfa aboard that vessel during the last part of the voyage when you were going into Japan?

A. I don't recall. [99]

Q. When the vessel was in foreign waters, especially in Japan, do you have any experience there

(Testimony of Charles Franklin Gardner, Jr.)
of getting medical drugs or ointments, or anything
of that nature from the Navy?

Mr. Gay: If your Honor please, I am going
to object to this on the ground that the witness is
not the medical officer, and there is no foundation
laid to show that he was the one to procure it.

Mr. Schaldach: All right, Mr. Gay, I will with-
draw the question.

Q. Mr. Gardner, you were not the medical officer
on that vessel, the Chief Mate was?

A. That is right.

Q. And, as such, he had charge of the hospital
and all the medical supplies? A. That is right.

Q. And if there were penicillin or sulfa or any
of these other things, he would be the one to know?

A. He would be the one to know.

Q. And not you, is that correct?

A. That is correct.

Q. Would you have occasion to treat anyone,
or go to the medicine cabinet for any of those
things? A. I have at various times, yes.

Q. Did you do it in the case of Mr. Clavel?

A. I did not. [100]

Q. Do you know whether or not during the
course of that voyage there was a medical log
aboard that vessel?

A. Yes, there is always a medical log kept—we
kept a medical log at all times.

Q. You kept a medical log at all times?

A. That is right.

Q. And do you recall after the voyage upon
which Mr. Clavel had an infected finger whether

(Testimony of Charles Franklin Gardner, Jr.)

or not Mr. Taylor from my office came down to the "Picos" and talked to you concerning the medical log? A. He did.

Q. And do you recall where that was?

A. In the hospital.

Q. In the hospital?

A. In the vessel's hospital.

Q. In the vessel's hospital, and where is that located?

A. That is located on the after port corner of the midship house.

Q. The after port corner of the midship house?

A. Yes.

Q. And do you recall approximately the month or the year that Mr. Taylor came down there?

A. It must have been in September of 1948.

Q. September of 1948? A. Yes, sir. [101]

Q. And where was the vessel at that time?

A. We were in Moore's dry dock.

Q. And that is over in—— A. Oakland.

Q. —Oakland. And did Mr. Taylor ask questions of you concerning the happening of this accident at that time? A. Yes, he did.

Q. Now, did he also—will you state whether or not Mr. Taylor examined the medical log?

A. Yes, we went over that together.

Q. Will you state whether or not Mr. Taylor made any notes from the medical log?

A. Yes, he did.

Q. Did you allow him to take the medical log—

(Testimony of Charles Franklin Gardner, Jr.)
strike that. Did Mr. Taylor ask you to allow him to take the medical log with him?

A. I don't recall; he may have; but that is not supposed to be removed from the ship.

Q. Is the medical log ever removed from the ship? A. Not ordinarily.

Q. However, Mr. Taylor didn't take the medical log with him? A. No.

Q. While you were aboard the vessel there on this particular voyage which started in January, 1948, from the time the vessel left Singapore to the time it arrived in Yokosuka, Japan, [102] and operated on this course which Captain Garner charted from April 24th to May 3rd 1948, did you ever hear Mr. Clavel ask either the Captain or the Chief Mate, either Captain Johnson or Mr. Coward, the Chief Mate of the "Picos," to take the vessel into Manila or to radio for any medical treatment or advice regarding his condition?

A. I did not. That would not concern me at all.

Q. That would not concern you? A. No.

Q. During the period of time from April 24th to the time the vessel arrived at Yokosuka, did you see Mr. Clavel about the ship?

A. Yes, I did.

Q. How often would you see him, if you have any recollection, during that period of time?

A. Oh, nearly every day.

Q. Did he have any bandage on his hands, or other portions of his body?

A. Yes, I was present at several of the times when the officer was treating his finger.

(Testimony of Charles Franklin Gardner, Jr.)

Q. And what did the Chief Officer do in the way of treatment that you noticed or saw at the time?

A. Well, he removed the dead skin from around the wound, and he used, I believe, Ichthymol ointment on it. I don't recall exactly everything he did. I didn't pay much attention. [103]

Q. But you did see the Medical Officer treating him on various occasions during the time from the time the vessel left Singapore until it arrived at Yokosuka?

A. Well, between——

Q. Between those times. Now, during those times that you observed the Chief Officer changing these bandages, or putting the ointment on, whichever he was doing, did you ever hear Mr. Clavel ask the medical officer to radio for medical advice?

A. No, I didn't.

Mr. Gay: There is no testimony he ever asked the Chief Officer to radio for medical advice.

Q. (By Mr. Schaldach): Did you ever ask or did you ever hear at any time that you saw the Chief Mate changing the bandage or putting ointment on it, did you ever hear Mr. Clavel ask him to request the master to radio for medical advice?

A. No, I didn't.

Q. And during those times that you saw this treatment afforded by the medical officer, the Chief Mate, did you ever hear Mr. Clavel ask the Chief Mate to request the Captain to turn the ship back to Manila?

A. No, I did not.

Mr. Schaldach: You may examine. [104]

(Testimony of Charles Franklin Gardner, Jr.)

Cross-Examination

By Mr. Gay:

Q. What watch were you on, Mr. Gardner?

A. Twelve to Four watch.

Q. Huh?

A. Midnight to 4:00 a.m., noon to 4:00 p.m.

Q. As second officer of the vessel, in general what are your duties?

A. At sea my duties are to stand my watch, to take morning sights, carry on navigation in connection with the Master, and in port to load and discharge the ship.

Q. Yes. You were the navigation officer, were you not? A. Yes, sir.

Q. And you had no direct control or association with Mr. Clavel, did you? A. No, I didn't.

Q. He was the Boatswain of the vessel, wasn't he? A. Yes.

Q. And the Chief Mate of the vessel is the one who takes care of the general upkeep of the vessel, isn't he? A. That is right.

Q. And the Boatswain works with the Chief Mate? A. That is right.

Q. The Chief Mate gives him instructions what to do, and the Boatswain will carry out the orders on deck in taking care of the ship's work; is that right? [105] A. Yes, sir.

Q. And you, when you are on duty you are up on the bridge a great deal, aren't you?

A. At sea, yes.

(Testimony of Charles Franklin Gardner, Jr.)

Q. Yes, at sea. So that from 12:00 to 4:00 during the daytime you would be up on the bridge taking care of the navigation most of the time?

A. That is right.

Q. And, of course, from 12:00 to 4:00 at night time, Mr. Clavel and the rest of the crew who are off watch are sleeping?

A. That is right.

Q. —in their rooms. So you really came in contact with Mr. Clavel very, very little, didn't you?

A. No direct contact in the way of work, no, just seeing him about aboard the vessel. The ship is a small place.

Q. Now, you say that you checked the medical supplies on board. At the beginning of the voyage?

A. At the beginning of the voyage.

Q. In San Francisco?

A. In Oakland.

Q. All right, in Oakland. And did you check on penicillin?

A. I did.

Q. Would there be a record with the ship's company of the amount of penicillin that was taken on?

A. There should be. [106]

Mr. Gay: I demand the production of those records, if you please, Mr. Schaldach.

Q. How about sulfa drugs? Did you have any sulfa drugs?

A. We had sulfa.

Q. How much penicillin did you have?

A. I don't recall off hand, but there was quite a number—they came in small bottles.

Q. Yes. Do you know how many there were?

A. No, not right off hand.

Q. How did the sulfa drugs come?

(Testimony of Charles Franklin Gardner, Jr.)

A. They are tablets about the size of your thumb nail.

Q. Do you remember how many of those there were?

A. No. They come in bottles of a thousand usually.

Q. You can't say how much there was, but you just know there was some taken on board?

A. That is right.

Q. Do you know when the supplies gave out, or did they give out of your own knowledge?

A. I don't know whether they did.

Q. You don't know whether they did, or you don't know they did?

A. I don't know that they did give out.

Q. Then, so far as you know they actually had penicillin and sulfa drugs on board at the time Mr. Clavel's finger was being treated? [107]

A. At the time I don't know exactly if they had penicillin, because several of the members of the crew were treated for venereal disease throughout the voyage with penicillin.

Q. Do you know whether they had any sulfa drugs at the time Mr. Clavel was being treated?

A. At that particular time I do not.

Q. Did the Mate ever tell you, or give you any reason why he didn't give Mr. Clavel penicillin or sulfa drugs?

A. He never discussed with me the treatment of Mr. Clavel at all.

Q. You know something about medical treat-

(Testimony of Charles Franklin Gardner, Jr.)

ment—well, I will strike that, that is argumentative. What was the last time on that voyage prior to Mr. Clavel's injury that you checked the medicine chest?

A. I don't recall when inventory was taken on that. Inventory would be taken just prior to requisition, but I don't remember exactly when that would be taken.

Q. When would the requisitions be made?

A. Well, prior to entering port. Either——

Q. You went first to Yokohama, did you, from the United States you went to where?

A. We went from San Pedro to Pearl Harbor.

Q. All right, from Pearl Harbor, where?

A. To Yokosuka.

Q. Did you have anything to do with making up a requisition [108] on arrival of the vessel at Yokosuka to get any more medical supplies there?

A. No, I didn't.

Q. Do you know whether any requisition was made? A. No, I don't.

Q. Would that be a matter of the ship's record? Would there be records on the ship?

A. They might still be there, yes.

Mr. Gay: I demand the production of those records.

Q. Now, the medical log after a certain time is turned in to the company, isn't it?

A. Not to my knowledge.

Q. I don't mean this by way of argument, but they don't leave the medical log on there for five

(Testimony of Charles Franklin Gardner, Jr.)
years, do they? Something is done with it. What is usually done with the medical log?

A. Well, it is kept with the rest of the log books.

Q. Well, those log books are turned into the company, aren't they?

The Court: They are kept on the ship?

A. There is always a copy of every log kept on the ship.

Q. (By Mr. Gay): For how many voyages do you keep them on board, is my point.

A. I don't really know how long they keep them. They keep them indefinitely, as far as I know, one copy. [109]

Q. You don't know whether the Captain or the Mate or anyone else did anything about getting penicillin or sulfa drugs when the vessel first touched at Yokosuka?

A. Not when they first touched, but when we first ran out of penicillin they made an attempt to get more penicillin.

Q. Where? A. In Japan.

Q. Who made the attempt?

A. Either the Master or the Mate. If the Mate made the attempt, he made it through the Master.

Q. As a matter of fact, they got more penicillin when the ship got back to Yokosuka, didn't they?

A. They may have. We had venereal disease on the ship and they were using——

Q. So they got a new supply before the ship came back to the United States, didn't they?

A. Yes.

(Testimony of Charles Franklin Gardner, Jr.)

Q. So there was penicillin and sulfa drugs available in Japan. Now, do you know what facilities there are at the other end of the leg (indicating on blackboard)——

A. Bahrein Gulf.

Q. Bahrein Gulf. Do you know whether they have medical supplies?

A. They do have medical supplies, but they don't part with them very easily. [110]

The Court: Well, I understood you to say as part of your cross-examination that either the Mate or the Mate through the Master attempted to get penicillin during the voyage some place when they ran out.

A. That was in Japan.

Q. Now, did they get it, or not; or do you know?

A. Yes, they got penicillin before we started home, because several of the fellows were being treated at that time for syphilis.

Q. You mean on the return trip from Japan to the United States you know men were being treated with penicillin?

A. That is right.

Q. (By Mr. Gay): You don't know whether any attempt was made to get penicillin or sulfa drugs at Bahrein on the first voyage from Yokosuka to the Persian Gulf?

A. I think at that time we still had penicillin left. You see, that was our first trip. Up until the time we arrived at Japan the first time, there was no need for any penicillin, none was used. It was after we left Japan the first time they first started using penicillin.

Q. In other words, when the vessel first touched Japan some of the men came back with venereal

(Testimony of Charles Franklin Gardner, Jr.)
disease and so forth? A. That is right.

Q. On the voyage from Japan to Yokosuka and back to Yokosuka at some time there they ran [111] out——
A. Of penicillin, yes.

Q. How about sulfa drugs?

A. I am not certain. I think they may have had sulfa at the time, because the men were being treated all the time for venereal disease. The baker was being treated for the entire round trip.

Q. Now, you have had the same medical training that the Mate would have to get in order to get his ticket? You have training along those lines?

A. Yes, but not the extent—not the experience.

Q. You have had the training, but not the experience?
A. Right.

Q. But it is well recognized at sea it was at that time that sulfa drugs and penicillin would be used for inspections, is that right?

Mr. Schaldach: Your Honor, if he knows, all right. If he doesn't——

The Court: Yes.

A. Yes, they are used for inspections.

The Court: Any redirect?

Mr. Schaldach: No, your Honor.

The Court: That is all.

Mr. Gay: I think we all join in wishing the witness good luck.

Now, if your Honor please, I want to read portions of—— [112]

The Court: I wonder if we could finish the taking of testimony today so we won't have to keep

any of these witnesses here or require them to come back tomorrow, and then the matter of the depositions may be considered, any portions you wish to call to my attention you may point out to me.

Mr. Schaldach: Your Honor, I think——

Mr. Gay: It is all right. I have no further witnesses.

The Court: Well, the depositions have already been received in evidence, and if there is no objection they will be considered as having been read.

Mr. Schaldach: Well, your Honor, I want to make that stipulation with Mr. Gay to have them—they are introduced into evidence, and if your Honor reads them—I don't know whether your Honor wants us to read them——

The Court: Well, I intended to read them, but I thought possibly you might in a memorandum call my attention to important matters in those depositions so in reading them I won't overlook the points you deem important. I just want to save these witnesses coming back, if possible.

Mr. Schaldach: Well, I have Mr. Taylor and the Captain here, but it will take—I think it will take some time, your Honor.

The Court: How long? Over an hour?

Mr. Schaldach: No, no, not over an hour.

The Court: Well, let's go ahead and put them on then. [113]

Mr. Schaldach: All right.

ROBERT C. TAYLOR

called for the Respondents; sworn.

Direct Examination

By Mr. Schaldach:

Q. Mr. Taylor, you are an attorney-at-law?

A. Yes.

Q. And you are employed by Mr. John Black?

A. I am.

Q. Did you visit the vessel, the tanker "Picos," sometime in 1948?

A. Yes, I did.

Q. And did you see Mr. Gardner aboard that vessel at that time?

A. Yes, I talked to him at that time.

Q. And at that time did you examine the medical log aboard that vessel?

A. Yes, I did.

Q. And will you state where you talked to Mr. Gardner and where you examined the medical log aboard that vessel?

A. I talked to Mr. Gardner in his own quarters aboard the vessel, and he then took me to the ship's hospital, which was in the after portion of the ship, and together we examined the medical log which was kept in the hospital.

Q. Did you request anyone aboard that vessel to take that [114] medical log ashore?

A. Yes, I asked Mr. Gardner if I could take it with me, but he said it was required it be kept aboard the vessel. I copied the entries on it.

Q. In regard to what matter?

A. In regard to the treatment of Otto Clavel.

(Testimony of Robert C. Taylor.)

Q. Will you describe this medical log?

A. Yes. It was a paper bound book about the size of a typewriter sheet of paper, 8½ by 11, and covered with brown paper covers, and it is my recollection it was very similar to the type of composition book that is used in grammar school and high school. It had lined pages.

Q. And what was contained in there?

A. The records of the medical treatment that had been afforded various crew members throughout this voyage, and I believe preceding voyages. I know it was quite extensive and I went through it until I came to the dates under which Clavel had been treated, and then, of course, followed the details of that treatment throughout its course.

Q. Now, since that time in 1948 have you been aboard the "Picos" recently in an attempt to find that book?

A. Yes, I have. I have been aboard it twice, yesterday and the day before.

Q. Did you talk to someone down there regarding it?

A. Yes, I talked to Captain McGee, who is now the officer [115] in charge of the vessel, and also to the Second Mate, Mr. McDonald, who is acting in charge during the Captain's absence, and I also talked to Mr. George Clark, the Superintendent of Claims of Pacific Tankers, in an effort to locate this book, as well as Captain Dugan, who was on the ship, I believe, on the voyage which left in Septem-

(Testimony of Robert C. Taylor.)

ber of 1948 and came back to the States in June of 1949.

Q. I see. Did Captain Dugan advise you anything concerning this book?

A. Yes, he did. Captain Dugan told me that he remembered having seen the book and that it was kept in the right hand drawer of the dresser in the Captain's bedroom. He said that he noticed it particularly because it related principally to medical treatment which had been afforded crew members prior to the time he took over the vessel, which was in the fall of 1948. He said that they were then keeping a separate medical log and that he had no further use for this one so that he left it exactly where it was. He said it remained there throughout the time he was in charge of the vessel, and so far as he knew was still aboard the vessel when he left her in July, 1949.

Q. In accordance with the conversation you had with him, did you go aboard the vessel in an attempt to locate the log?

A. I then went aboard the vessel and looked where he told me to look, and in addition to that I looked through every [116] drawer and file cabinet in the Captain's quarters, in the office and in the ship's office, and also through all the drawers and filing cabinets in the ship's radio room. I might say, Mr. Schaldach, that the vessel is presently undergoing preparatory repairs for being placed in lay-up, so that a lot of material has been removed from the vessel. But I searched everything that was there in an effort to locate the log.

(Testimony of Robert C. Taylor.)

Q. Did you also contact the officer of Pacific Tankers, Mr. Clark?

A. Yes, I did, and I inquired from him of what the possibilities might be of the log having been turned in to him, and he said had it been turned in to him it would be kept in the files together with the files of the "Picos." I went through that file with him item by item, and there was no log book there. And then on the off chance it might be misfiled in the packages for some other vessel, we went through every file they had; that is, every log book file for all the vessels, and could not find this particular one.

Q. And now you said that at the time you talked to Mr. Gardner in 1948 you made notes of the entries regarding Clavel?

A. Yes, I did.

Q. And I will show you two pieces of legal yellow paper and ask you if that is your handwriting?

A. Yes, it is.

Q. And I will ask you if that contains the interview with [117] Mr. Gardner and also contains the notations from the medical log concerning Mr. Otto Clavel?

A. Yes, it does.

Q. Will you read, Mr. Taylor, the entries that you have there—strike that. Are the entries that you have there on these pieces of paper regarding the entries in the medical book which you examined in 1948—were they copied by you word for word from that particular medical log?

A. Yes, I made a verbatim copy of the entries

(Testimony of Robert C. Taylor.)

in the medical log for the period of Mr. Clavel's treatment.

Q. Will you read what you have put down there on that yellow piece of paper as taken from the medical log?

Mr. Gay: Well, just a moment. I will object to that. If it is admissible at all, the paper itself should be offered in evidence.

Mr. Schaldach: We are going to offer it in evidence.

Mr. Gay: Well, then, why don't you offer it in evidence?

The Court: You have no objection to its admissibility, have you?

Mr. Gay: I have no objection. I simply want to inquire of the witness whether there is any possibility that he overlooked any entries?

A. No, Mr. Gay, I don't think there is.

Q. (By Mr. Gay): In your honest opinion, that is a complete copy of the medical log of everything that relates to Mr. [118] Clavel? A. It is.

Mr. Gay: Then I have no objection.

The Court: Of course, this witness could refer to this memorandum to refresh his memory and tell what he found in it. Of course, it is more satisfactory to have verbatim what he took down.

Mr. Gay: That is what I think.

Mr. Schaldach: That is what I want to do.

The Court: Why don't you proceed to offer it in evidence and read it, then? There is no need having the witness read it.

(Testimony of Robert C. Taylor.)

Mr. Schaldach: Well, maybe I can't understand his writing, your honor. I will offer it in evidence.

(The document referred to was marked Respondents' Exhibit B.)

Mr. Schaldach: If counsel has no objection, I will have the witness read it, because it is in his handwriting.

Mr. Gay: It seems to me the sensible thing to do is to offer it in evidence——

The Court: It is offered and received. I would like the witness to read it. The witness can interpret his own writing much easier.

Mr. Schaldach: Read the entries opposite each date.

A. "April 25, 1948"—— [119]

Mr. Gay: May I look over your shoulder?

Mr. Schaldach: Surely.

A. "0900, Boatswain, bandaged hand with Ichthymol ointment.

"2000, hot Epsom Salts on compress.

"April 26, 0830, Bos'n. Clavel, dressed infected hand.

"2000, dressed hand. I.O. drawing salve."

It is my impression that meant Ichthymol Ointment there, but they had it abbreviated "IO."

"April 27, Bos'n, drained and dressed hand, 2 Pheno."

Mr. Gardner explained to me that was two phenobarbital tablets.

"April 28, 8:30, drain and dress hand," and a

(Testimony of Robert C. Taylor.)

similar entry with no date said, "drain and dress hand and hot Epsom Salts. Pheno at night."

"April 29, drain and dress hand.

"April 30, 0800 and 2000, drain and dressed hand.

"April 1, 0800"—I beg your pardon—"May 1, 0800 and 2000, drained and dressed hand.

"May 2, 0800 and 2000, drained and dressed hand.

"April 3"—

Mr. Schaldach: May, the 3rd.

The Court: May 3rd.

A. "May 3rd, 0800 and 2000, drained and dressed hand.

"May 4th to May 7th, Bos'n. to hospital.

"May 8th, 0800 and 2000, dressed hand. [120]

"May 9th, 8:30, dressed hand.

"May 10th, 8:30 to 2100, dressed hand.

"May 11th, 8:00 and 2000, dressed hand.

"May 12th, 8:00 and 2000, and to 5/20 daily, dressed hand."

Mr. Schaldach: That is all.

The Court: Cross-examination.

Mr. Gay: No cross-examination.

The Court: That will be all.

Mr. Schaldach: Mr. Gardner, will you retake the stand a moment, please?

CHARLES FRANKLIN GARDNER, JR.

recalled for the Respondents; previously sworn.

Mr. Schaldach: Your Honor, I omitted to bring the log books here. I would like to have them introduced through Mr. Gardner as being one of the officers——

The Court: I suppose there is no foundation for this going in evidence——

Mr. Gay: I just want to get the dates, your Honor.

Direct Examination

By Mr. Schaldach:

Q. Mr. Gardner, you have in your hand the deck log books of the "Picos" for the first voyage, have you, that you were the Second Officer on that particular ship? A. Yes, sir.

Q. And the log books that you hold in your hand, what are [121] they called? A. Rough logs.

Q. Rough or smooth?

A. These are the rough logs.

Q. These are the rough logs. And will you tell me, Mr. Gardner, on this voyage when the vessel arrived at Japan on the second leg or the home leg of the voyage——

Mr. Gay: That is already covered by the Captain's testimony. It is in there anyhow.

A. 14:36 on the third day of May we took arrival at Yokosuka.

Q. (By Mr. Schaldach): What is that hour?

A. 2:36 p.m.

(Testimony of Charles Franklin Gardner, Jr.)

Q. 2:36 p.m.? A. 14:36.

Q. Is that 6:00 o'clock at night?

A. No, 2:36.

Q. Oh, 2:36 p.m. I see. A. 2:36.

Q. When did the vessel leave Yokosuka on the return to the States?

A. 17:00 on the seventh day of May.

Q. That would be 5:00 o'clock in the evening?

A. 5:00 o'clock in the evening.

Q. They took departure on Yokosuka?

A. Yokosuka. [122]

Mr. Schaldach: I would like to have this introduced, your Honor.

The Court: Received.

Mr. Schaldach: This particular log book here. I would like to have both received.

(The documents referred to were marked Respondents' Exhibits C and D.)

Mr. Schaldach: I have here Respondents' Exhibit D, and I will ask you what the notations here—that is, the hours of 0800 and 2000?

A. 0800 is 8:00 a.m.

Q. That is 8:00 o'clock in the morning?

A. 8:00 o'clock in the morning.

Q. And 2000 is——

A. 8:00 o'clock at night.

Q. 8:00 o'clock at night. I see. That is all, Mr. Gardner.

Mr. Gay: That is all.

The Court: That is all.

Mr. Schaldach: Captain Greenleaf, will you take the stand, please?

JOHN GREENLEAF

called for the Respondents; sworn.

Direct Examination

By Mr. Schaldach:

Q. What is your business, profession, or [123] occupation?

A. Master Mariner and Marine Surveyor.

Q. For how long have you been a Master Mariner, held the license as Master Mariner?

A. I have held a license for about eight years as Master Mariner.

Q. Before that how long did you hold any other license?

A. Well, I got my original Third Mate's license in 1926, I think it was.

Q. And during the course of 1926 to date, I assume you have sailed as Third Mate, Second Mate, First Mate, and Master Mariner? A. Yes.

Q. What sort of ships have you sailed on?

A. Well, I have sailed them all the way from the old steam schooners to the "Leviathan."

Q. I mean, did you sail aboard tankers, Victory ships, C-2's, C-3's? I have them in mind.

A. Yes.

Q. You have sailed aboard all types of vessels?

A. All types of vessels, yes.

(Testimony of John Greenleaf.)

Q. Will you state whether or not you have commanded Army Transports?

A. No, I have never commanded Army Transports, no. I have commanded commercial vessels. I have been Chief Officer on [124] Army Transports.

Q. Captain Greenleaf, in your experience as Master of a vessel—let me ask you this: Approximately how many vessels during the period of, say, the last eight years, have you been a Master Mariner or have you been Captain of or in command of?

A. Well, during the war we were shifted around quite often. I suppose I have—well, I commanded about seven Liberties and two C-2's, I think.

Q. And during the period of eight years you have commanded other than Liberties and C-2's?

A. Well, I have had better than five years actual command of various types of vessels. I have acted as pilot on tankers—as far as that goes, I hold pilot licenses for here, Los Angeles, and Honolulu.

Q. Now, Captain, the Master aboard a vessel, what are his duties regarding the operation of the vessel?

A. Well, he is in command of the vessel.

Q. And the various heads of departments, the deck department and the engine department, steward's department, are they all under the command of the Captain and subject to his control?

A. Absolutely, yes.

Q. Now, with respect, Captain, to injuries suffered by seamen aboard ships, in whose discretion lies the responsibility for determining whether or

(Testimony of John Greenleaf.)

not the condition is or is not a serious one? [125]

Mr. Gay: I will object to that, if your Honor please. The question is directed to one of law. The law covers the subject. There is no question where the responsibility lies.

The Court: No, I don't think so, I think it embraces a factual matter who decides whether it is a serious matter or not. Overruled.

A. The Master of the ship has the ultimate responsibility, but he delegates certain authority to those of his officers he considers the most qualified in the case of a medical officer on some vessels that do not carry a regular doctor.

The Court: Of course, we are interested in this particular ship on this voyage.

Mr. Schaldach: Yes, but I just want generally the Captain to state the practice aboard the vessels that do not carry doctors.

A. Those that do not carry doctors, but a Purser and Pharmacist Mate, the Pharmacist Mate is——

The Court: Well, the "Picos" on this voyage——

A. Well, the Master can delegate the responsibility to a licensed deck officer.

The Court: Did you delegate that to someone?

Mr. Schaldach: He was not master aboard the vessel, your Honor. Captain Greenleaf I am calling for the purpose of eliciting expert testimony on this matter.

The Court: Go ahead. [126]

(Testimony of John Greenleaf.)

Mr. Gay: Captain Johnson's testimony is here by way of deposition, he being at sea now.

Mr. Schaldach: Will you state whether or not, Captain Greenleaf, it is necessary—strike that. Will you state whether or not a man, before he obtains a license or before he becomes a licensed officer has to have certain qualifications with respect to medical care or treatment?

A. He has to show a first aid certificate or evidence that he has taken a prescribed course in first aid before he is allowed to sit for the body of his license examination.

Q. Do you know what that particular examination concerning medical care and treatment consists of, what they have to know?

A. In a general way it consists of the diagnosis of serious diseases and their treatment within the scope of the supplies available aboard ship, treatment of fractures, venereal diseases, and the general health and sanitation of the ship.

Q. And each licensed officer has to have some knowledge concerning the matters that you have testified to here?

A. Yes, they do.

Q. Now, Captain, in your opinion where there is a serious injury—strike that. Captain, in your opinion where an injury to a seaman takes place aboard shipboard at sea, the severity of that injury is called to the Captain's attention by whom?

A. By the medical officer. [127]

Q. And will you state whether or not the Captain's discretion as to what he shall do or what

(Testimony of John Greenleaf.)

course he should take, is that governed by what the medical officer tells him?

Mr. Gay: Now, just a second.

A. In——

Mr. Gay: Just a second. I will object to that, if your Honor please, on the ground that the discretion that the Master has is stated by law.

The Court: Sustained. This witness has testified that the ultimate decision is his.

Q. (By Mr. Schaldach): Captain, assuming that you were Master of the vessel, a tanker, and that one of the members of the crew came up to you with a cut in his finger which had become infected and he was being treated by the Medical Officer aboard that vessel, and the cut or whatever he received there, injury to his finger, became infected and the infection was such that it became necessary to incise it and drain it, and the draining persisted, and hot water treatment with Epsom Salts were given, would you consider such a condition a serious one whereby you would order the vessel three or four hundred miles off its course to a port which would take two or three days, or would you continue on to the port of destination, which would take about five or six days?

Mr. Gay: Well, now, I will object to that as clearly improper. [128]

The Court: Sustained. I will say this to you. Mr. Schaldach, that possibly the general custom and practice might be admissible as bearing upon the question of what an ordinarily prudent person would do under those circumstances.

(Testimony of John Greenleaf.)

Mr. Schaldach: Well, I don't want to become too specific in my question.

The Court: Well, you are very specific. You are asking this man what he would do.

Mr. Schaldach: Well, as Captain of the vessel.

Q. Captain Greenleaf, as the Master of the vessel, what is the custom—in your experience as a Master of a vessel, is it the custom of a Master, or what is the custom at sea—what discretion the Master has to determine the severity of the injury—strike that. In your experience as the Master of a vessel, Captain, during the period of time that you have told us here, is it the practice and custom with respect to injuries which become infected and which are localized, is it the custom to radio or to go to the nearest port, or to continue on the voyage when there is no apparent danger of the loss of an arm or leg through gangrene or other deep seated infection?

Mr. Gay: Well, I will object to that, if your Honor please, because it assumes—it practically answers itself. He says if it is not serious——

The Court: Well, it simmers itself down to this: The [129] discretion is in the captain. I assume if he thought it was not serious he would not turn back or deviate from his course, but go on to the port which was his destination.

Q. Well, let me ask you this: What is usually done if there is a serious injury, one where life is in danger?

(Testimony of John Greenleaf.)

A. Well, it is our duty to do all we can to protect the life and welfare of our crew. If we have a case that comes up—an injury aboard ship that we are not certain just exactly how to handle it, we take advantage of this particular radio medical service and radio our description of the case in to the nearest medical center and they give us instructions on how to treat it, and if we find that we haven't the means or the material with which to treat the injury, then we try to contact some other ship that is carrying a doctor and transfer the patient to a place where he can be treated, and in the absence of any other well equipped vessel in the vicinity, if we are within a reasonable distance of any port that there is a medical facilities, we, of course, put in to that port.

Q. (By Mr. Schaldach): Captain, in your experience as a Master aboard a vessel, have you seen or has it been called to your attention—strike that. In your opinion as a Master aboard vessels, infections through cuts, will you state whether those are common, or whether they are rare aboard vessels?

A. Well, they are fairly common. When a gang of men are working on the deck of a ship and doing heavy lifting and where [130] they are constantly getting cuts and bruises, some of them get slightly infected, but if they are reported immediately to the Medical Officer and prompt action can be taken, we rarely have trouble with them.

Q. And with respect to the treatment there and whether the vessel should turn in to port or continue

(Testimony of John Greenleaf.)

on, I think you have stated before that is in the discretion of the Captain?

A. Absolutely, yes.

Q. Now, Captain, have you had the—is it your experience that certain injuries do occur which are of a slight nature, and you find out that ultimately they may become serious after a long period of time has elapsed?

Mr. Gay: I object to that on several grounds. It is immaterial, it is very——

The Court: Yes, and I think you are taking this witness into a field in which he is not qualified.

Mr. Schaldach: All right, your Honor. You may cross-examine.

Cross-Examination

By Mr. Gay:

Q. What is your present business connection?

A. R. E. Dobie and Company, ship engineering and marine surveyors.

Q. What company is that?

A. R. E. Dobie and Company, ship engineering and marine [131] surveyors.

Q. How long has it been since you went to sea?

A. Well, I recently was out of Japan for the Army, but I got a broken leg and came back here again, and since I have been in San Francisco I joined Captain Dobie, and have been for the last fifteen months or so.

Q. Have you had any connection with Pacific Tankers?

(Testimony of John Greenleaf.)

A. No, I have not—you mean have I sailed their ships?

Q. Yes.

A. No, I have not. I am not a tanker man primarily, although I have sailed on tankers.

Q. Now, you have stated, Captain, it is possible to radio in for advice, and that is frequently done. isn't it?

A. Yes, when the case seems to demand it, yes.

Q. And there also are quite frequently instances where a ship will radio into port that they have a sick man or an injured man on board, and sometimes they will send out an airplane to pick him up, too; is that right?

A. That has been done. It is rather rare.

Q. And you are acquainted with the waters in the South China sea between Singapore and Japan?

A. Yes, quite well.

Q. And in 1948, in the spring of 1948 there would be considerable traffic along this line, would there not? You see this line? (Indicating on black-board.) [132]

A. Yes.

Q. That is the usual course, isn't it?

A. To Japan, yes, from the Singapore Straits.

Q. And there would be vessels passing, going one way and another along that—along that approximate course right along there?

A. That is a reasonably busy route so far as tankers are concerned.

Q. Do you know of instances, too, where a Master

(Testimony of John Greenleaf.)

has put his ship into port, or even turned around and gone back into port to obtain hospitalization for his injured man, don't you?

A. When it is a case of life or death, yes.

Q. Well, if it was a case of serious permanent injury, you would do that, too, wouldn't you?

A. Yes.

Mr. Gay: That is all.

Redirect Examination

By Mr. Schaldach:

Q. Captain, do you know what the condition of Manila Bay was in the spring of 1948 with respect to the wreckage of vessels, submerged vessels, in that harbor?

A. Yes, the place was full of wrecks. It still is. Quite a number of them have not even been removed right now.

Q. Captain, with respect to a vessel being operated from the poop deck—where is that, incidentally, the poop deck?

A. Well, that is the extreme stern of the vessel.

Q. Is that the usual or ordinary place that the vessel [133] is operated from?

A. No. There is an emergency steering station back there. It usually is operated from the bridge.

Q. Captain, would you consider it in your opinion a risk to the vessel to operate it from the poop deck going into a harbor such as Manila, and the conditions existing there in the spring of 1948?

(Testimony of John Greenleaf.)

A. I certainly would, steering from back aft, yes, indeed.

Q. Why, Captain?

A. Because your view is obstructed, you can't see ahead and have to transmit orders by telephone from the bridge, and it is very difficult to give the man at the wheel, where his view is obstructed, an idea where a certain wreck is, or even the ordinary surface traffic would present a very grave danger, and in the case of an oil tanker—I assume you mean this particular vessel here—hitting one of these submerged wrecks with a loaded tanker, you have a very definite fire hazard and would endanger the whole ship and the whole crew.

Mr. Schaldach: That is all.

Recross-Examination

By Mr. Gay:

Q. Well, Captain, you know that ships are, and have been for the last several years, going into Manila Harbor?

A. The harbor is open, yes, under normal operating conditions.

Q. Now, all right, since we are talking about putting an [134] injured man ashore, the vessel would not have to go right up to the dock to put him ashore, would it? They could radio in or signal in and have someone come out and pick him up, couldn't they?

A. Well, the wrecks are not all confined to the

(Testimony of John Greenleaf.)

area around the docks, Mr. Gay. They are all over the bay.

Q. I mean even if they didn't want to go inside the bay, they could come close to port and radio in, couldn't they?

A. For whom to come out after him? I don't quite understand.

Q. The United States Army is still there, isn't it?

A. Yes.

Q. And the Navy is still there, isn't it?

A. There isn't much Navy down there now, and the Army has been greatly reduced.

Q. Well, in a large port, and Manila is a large port, isn't it?

A. Well, it is not anything now to what it was before the war.

Q. Well, I am not comparing it to before the war, but it is a substantial port with lots of shipping, they have shipping facilities there?

A. Yes, they have shipping facilities there.

Q. And if a vessel didn't want to go right into that harbor it could stay outside the harbor and still have somebody come out and pick the man up, couldn't they? [135]

A. Yes, they could, but there might be quite a considerable delay under existing conditions out there.

Q. What do you mean by considerable delay?

A. Well, Manila is not a very efficiently organized port right now. Since the Philippine independence there is a skeleton organization there, but they

(Testimony of John Greenleaf.)

have no equipment for sea rescues. Unless there happened to be some suitable craft available, I wouldn't want to gamble on it.

Q. Manila is on the southeast—southwest coast of Luzon, is it not? A. Yes, southwest.

Q. And is there also a port on Mindenoa?

A. I don't know the condition of Mindenoa now. There is some small settlements around there. There is no commercial ports worthy of the name out there. I think they are pretty well blown up.

Mr. Gay: Oh, that is all.

Mr. Schaldach: No further questions.

The Court: That is all.

Mr. Schaldach: Those are all the factual witnesses, your Honor.

The Court: Any rebuttal?

Mr. Gay: No, other than, of course, I haven't even completed my case in chief, unless it may be stipulated that as far as my case in chief I am entitled to read such portions [136] of the depositions——

The Court: I think the understanding was that they are already deemed read in evidence, and all you need to do is call to my attention whatever you want me to consider in connection with those depositions.

Mr. Gay: That is all I have, your Honor, unless I may think of a question or two to ask Mr. Clavel in the morning.

The Court: Well, I intended to devote tomorrow to another case.

Mr. Gay: Well, aren't we going to have an opportunity to argue this orally?

The Court: I was going to suggest you submit it on memoranda.

Mr. Gay: Oh, anything your Honor directs, but I would have voluminous—not voluminous, but there is considerable testimony that I want to read to the court right here in argument, if I may.

The Court: Well, if I do that I am going to disrupt somebody else that wants to try a case here tomorrow, and, of course, counsel are expected to cooperate with the court, and when we can dispose of a case in one day and not take two days, we should do so.

Mr. Schalbach: I am willing to submit it.

The Court: I suggest you submit it on memoranda, and you can have ample time to submit it, and it is for the purpose [137] of permitting you to go not only into the depositions, but also the legal problems Mr. Schaldach has called to the Court's attention.

Mr. Gay: Well, I have some legal questions. All I can say is, state frankly, your Honor, I would not feel entirely satisfied with that method. Now, if the matter could perhaps go over until tomorrow afternoon or when your Honor——

The Court: Well, we cannot do that. If I put it over to tomorrow, I will have to crowd somebody else out from being in court with their case. I am just asking you if you can cooperate with the court. The Court has a very congested calendar.

Mr. Schaldach: I am willing to submit the matter on your Honor reading the depositions.

The Court: I will read the depositions, and each one of them. I will read them this evening, and if after your memoranda are in the Court feels that it is necessary or desirable that there be oral argument, I will certainly take that up with counsel.

Mr. Schaldach: What time may we have to file memoranda?

The Court: Well, fifteen, fifteen, and ten, if you wish.

Mr. Schaldach: Whatever your Honor wishes.

The Court: Very well, it will be submitted fifteen, fifteen, and ten. [138]

Certificate of Reporter

I, Clarence F. Wight, Official Reporter, certify that the foregoing 138 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ CLARENCE F. WIGHT.

[Endorsed]: Filed October 10, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled Action, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Libel by Seaman for Damages for Injuries.

Answer to Libel.

Answer of United States of America.

Minute Order of April 24, 1950—Entering Decree in Favor of Libelant.

Findings of Fact and Conclusions of Law.

Final Decree.

Proposed Counter Findings of Fact and Conclusions of Law.

Stipulation for Amendment of Decree and Order.

Petition for Appeal and Allowance Thereof.

Notice of Appeal.

Apostles on Appeal and Praecept Therefor.

Order Extending Time to Docket.

Deposition of John A. Johnson Taken on November 10, 1949—Libelant's Exhibit No. 1a.

Deposition of John A. Johnson—Libelant's Exhibit No. 1b and Map.

Deposition of George William Littlewood, Jr.,
February 1st, 1950—Libelant's Exhibit No. 1c.

Deposition of Louis P. R. Coward—Libelant's
Exhibit No. 1d.

Respondent's Exhibits Nos. A, B, C and D.

And I Further Certify that annexed hereto is the
original Citation on Appeal.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court at
San Francisco, California, this 6th day of October,
A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12706. United States Court of
Appeals for the Ninth Circuit. Joshua Hendy Cor-
poration, a corporation, sued herein as Pacific
Tankers, Inc., a corporation, Appellant, vs. Otto
George Clavel, Appellee. Transcript of Record.
Appeal from the United States District Court for
the Northern District of California, Southern Divi-
sion.

Filed October 6, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States District Court, Northern District of California, Southern Division, in Admiralty

No. 25319-G

OTTO GEORGE CLAVEL,

Libelant and Appellee,

vs.

PACIFIC TANKERS, INC., a Corporation;
UNITED STATES OF AMERICA, and
BLACK COMPANY,

Respondents and Appellant.

ASSIGNMENT OF ERRORS

Respondents and Appellant herein hereby assigns as errors in the proceedings, orders, decision and judgment in the District Court of the above-entitled action as follows:

I.

The District Court erred in entering a decree in favor of libelant and appellee and against respondent and appellant on his cause of libel.

II.

The District Court erred in entering a decree denying respondent and appellant a decree against libelant and appellee.

III.

The District Court erred in making and entering conclusions of law and order for decree made and entered in the above-entitled cause.

IV.

The decree herein in favor of libelant and appellee and against respondent and appellant is against the law.

V.

The District Court erred in failing to adopt the proposed findings of fact and conclusions of law offered by respondent and appellant, which are in accordance with the evidence and the law applicable to the case.

VI.

The District Court erred in not rendering a decree in favor of respondent and appellant and against libelant and appellee.

Dated: October 19, 1950.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Proctors for Respondent
and Appellant.

[Endorsed]: Filed October 19, 1950.

CERTIFICATE OF CLERK TO SUPPLEMENT
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing Assignment of Errors, is the original filed in this Court, and that it constitutes a Supplement to the Record on Appeal herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of October, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

In the United States Court of Appeals
For the Ninth Circuit

OTTO GEORGE CLAVEL,

Appellee,

vs.

PACIFIC TANKERS, INC., a Corporation,

Appellant.

ADOPTION OF STATEMENT OF POINTS
AND DESIGNATIONS OF RECORD

To Paul P. O'Brien, Clerk of the United States
Court of Appeals for the Ninth Circuit:

Appellant herein adopts the assignment of errors heretofore filed as the statement of points to be relied upon by appellant in the above cause, pursuant to Rule 19 of the Rules of the United States Court of Appeals for the Ninth Circuit.

Appellant further designates and requests that the record on appeal in the above-entitled cause shall include the entire records set forth and particularly designated in appellant's Apostles on Appeal and Praecepta Therefor heretofore filed.

Dated: Nov. 16, 1950.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

/s/ MURRAY W. SCHALDACH,

Proctors for Appellant.

[Endorsed]: Filed November 16, 1950.



No. 12,706

IN THE

United States Court of Appeals
For the Ninth Circuit

JOSHUA HENDY CORPORATION (a Corporation), sued herein as Pacific Tankers, Inc. (a Corporation),

Appellant,

VS.

OTTO GEORGE CLAVEL,

Appellee.

APPELLANT'S OPENING BRIEF.

JOHN H. BLACK,

EDWARD R. KAY,

HENRY W. SCHALDACH,

233 Sansome Street, San Francisco 4, California,

Attorneys for Appellant.

FILED

FEB 19 1951

PAUL P. O'BRIEN,

CLERK

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No. 12,706

IN THE

United States Court of Appeals
For the Ninth Circuit

JOSHUA HENDY CORPORATION (a Corporation), sued herein as Pacific Tankers, Inc. (a Corporation),

Appellant,

vs.

OTTO GEORGE CLAVEL,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal in Admiralty from a final decree entered by the United States District Court for the Northern District of California, Southern Division, in an action for damages by reason of personal injuries sustained by appellee, Clavel, for alleged failure of respondent, through its officers, to render medical care and attention to him.

Final decree was entered on the 23rd day of June, 1950, and stipulation for amendment of final decree was entered July 23, 1950. (Ap. 21.)

Petition for appeal and allowance thereof was filed July 21, 1950. (Ap. 27.)

Notice of appeal was filed on July 21, 1950. Apostles on appeal and praecipe therefor were filed on July 21, 1950. (Ap. 28, 29.)

Citation on appeal was filed on July 21, 1950. Assignment of errors was filed on October 19, 1950. Bond on appeal was filed on the 21st day of July, 1950. (Ap. 31.)

Jurisdiction of admiralty and maritime causes is vested in the Courts of the United States (28 U.S.C. 1333), under the Jones Act. (46 U.S.C. 688.)

This Court had jurisdiction to review the final decree of the District Court. (28 U.S.C. 1291.)

The libel originally named the United States of America as a party respondent in addition to appellant. At the time of trial the United States of America was dismissed by stipulation of counsel. At the time that the action was filed the appellant corporation operated under the name of Pacific Tankers, Inc. Prior to the time of trial the name of the appellant corporation was changed to Joshua Hendy Corporation, a corporation, and an oral stipulation was entered into by counsel to this effect. A written stipulation to the same effect was later entered. (Ap. 26.)

STATEMENT OF CASE.**A. The question involved.**

Must a vessel always deviate to obtain medical treatment for a minor injury to a seaman's finger, where such deviation in the conscientious and best judgment of the Master is unnecessary?

It is appellant's contention that the employer is not liable under the facts of the case at bar, for one or more of the following reasons:

(a) The appellant cannot be held responsible for an error of judgment on the part of its officers if their judgment is conscientiously exercised with reference to the treatment of the injury sustained by the seaman, and with reference to the conditions existing at the time.

(b) That the appellant is not liable for depletions in the stock of the medicine chest of the vessel with respect to certain drugs carried therein if appellant does not have an opportunity to replace or replenish the depleted supply.

(c) That the appellant cannot be held liable for failure to deviate where the injury was slight and where the medical care furnished the seaman was the ordinary and recognized treatment.

These questions arise because of the decree against appellant, and the findings of the Court below, that appellant was negligent.

B. The pleadings.

The libel alleges that the United States of America was the owner of the tanker "Pecos", and that the vessel was being operated by appellant, Pacific Tankers, Inc.; that the appellee was a seaman, to-wit, a bosun, aboard the "Pecos" and that on April 22, 1948 suffered an injury when he scratched his index finger, and as a result of said scratch said finger became infected, and that the treatment by the Mate and the Master was not beneficial and further that the appellee requested the Master and Mate to provide him with adequate skilled medical attention but none was provided until the vessel arrived at Japan. (Ap. 5.)

Appellee alleges that it has been necessary to amputate a portion of the appellee's index finger, and that the remaining portion of the finger is sensitive, and the movements of the second and third fingers of his right hand have been impaired. (Ap. 5.)

Insofar as the appellant is concerned, all of the material allegations of the libel have been denied by the appellant, with the exception of the allegation that appellant was the operator of said vessel and the employer of said appellee. (Ap. 7.)

The United States of America is not a party to this appeal having previously been dismissed at the inception of the trial of the action. (Ap. 34.)

C. The evidence.

In 1948 appellee Clavel was the bosun of the vessel "Pecos", a tanker, which sailed from San Francisco

to Yokosuka, Japan, shuttled between the Persian Gulf and Japan, and returned to the United States; he was sixty-one years of age, having gone to sea for some forty-seven years and having acted in the various capacities of able-bodied seaman, quartermaster and bosun aboard vessels. (Ap. 35.) During the course of the voyage from the Persian Gulf to Japan and on April 23, 1948, appellee Clavel was making an awning for the poop deck of the vessel, and had fashioned a sail needle out of a nail; during the course of his work he scratched his right index finger with the nail. (Ap. 36.) He first complained to Captain Johnson on April 25, 1948 that he suffered an injury to his index finger. (Lib. Exh. 1b, p. 15; Resp. Exh. B.) Captain Johnson referred him to Mr. Coward, the Chief Mate, who looked at his finger, and the Chief Mate and Captain Johnson ordered epsom salts solution treatment in the form of hot soaks; Ichthymol ointment was also applied. (Lib. Exh. 1a, p. 7 and 8; Lib. Exh. 1d, p. 5.)

Coward, the Chief Mate, checked daily to see that the appellee was soaking his hand, and subsequently lanced the finger, drew out some pus and put on drawing salve; after the finger was lanced the finger was still slightly swollen. (Lib. Exh. 1d, p. 5 and 6.) The lancing of the index finger of appellee took place on the 27th or 28th of April, and at that time there was no evidence of any blood poisoning. Although the finger was swollen, the Captain did not consider its condition serious enough to divert the ship as the

vessel was then only four days from its destination in Japan. (Lib. Exh. 1b, p. 16, 18.)

Captain Johnson and the Chief Mate Coward were not requested by appellee to divert and put appellee ashore or to radio for any medical advice (Lib. Exh. 1d, p. 6; 1a, p. 12); nor did appellee ever make any complaints to Captain Johnson about the type of treatment he was receiving. (Lib. Exh. 1a, p. 9.) On April 27 the "Pecos" was progressing northward in the China Sea toward Japan; on April 28 the "Pecos" was 260 miles northwest of Manila; this was the closest point it got to a port before arrival in Japan. On April 29 the "Pecos" was some 570 miles northwest of Manila. On the 28th and 29th of April the "Pecos" was some four days from Japan. The vessel arrived at a port in Japan on May 3, 1948. (Lib. Exh. 1b, Map p. 14.)

From the time that the finger was first treated by the ship's officers until the vessel arrived in Japan, there was no crook or stiffness of the right index finger. Appellee was up and about the vessel daily during the time his hand was being treated. (Ap. 124.) A record of the medical care and attention and treatment afforded appellee was kept in the medical log aboard the vessel. From the testimony of Robert C. Taylor, the medical log could not be found at the time of the trial of the action. However, Mr. Taylor testified that he had copied the entry in the medical log concerning the care and treatment of Clavel. (Ap. 137; Resp. Exh. B.) The date of the first treatment

to Clavel was April 25, 1948, at which time his hand was bandaged with Ichthymol ointment, and he was also given hot epsom salts compresses. From and after that date he was treated daily. On April 27 and 28 appellee was given phenobarbital at night. His finger was also treated and dressed on these days. On April 30 appellee's finger was again treated and dressed, and daily treatment continued until May 3, on which day the vessel arrived in Japan. Appellee was taken to a U. S. Navy hospital, where he remained from May 4 to May 7. After his return to the vessel May 8, his hand was dressed daily up to the date of May 20, the date of arrival at San Pedro. (Ap. 139, 140.)

While the "Pecos" was on the "shuttle run" the vessel "Pecos" made no regular ports of call or stops between Japan and the Persian Gulf. (Lib. Exh. 1b, p. 15.)

Gardner, the second officer of the vessel, testified that at the commencement of the voyage of the "Pecos" there was a goodly supply of penicillin and sulfa drugs aboard the vessel, but that the supply became depleted after leaving the Persian Gulf and before arrival in Japan, because of the unusual demands by the crew. It was his recollection there was no penicillin aboard the vessel between April 24 and May 2. (Ap. 131, 132.)

When the vessel arrived at Japan on May 3, the appellee was hospitalized and before the ship left Japan about May 28 he requested that the chief mate

come and get him so that he could return to the United States on the vessel (Lib. Exh. 1d, p. 7); at no time during the return voyage from Japan to the United States did appellee ever complain that he was not getting the proper care. (Lib. Exh. 1d, p. 8.)

Appellee's right index finger was amputated through the distal portion of the proximal phalange in August, 1948. He claims that he has a disturbance of the function in the grip of his hand due to a loss of a portion of the index finger, and some restriction in the motion of the adjacent fingers, and also complains of some pain in the amputated stump. Appellee returned to work the 2nd day of March, 1949.

Dr. Francis J. Cox, called as a witness by appellee, testified that he first saw appellee on February 25, 1950 and obtained a history from him concerning the injury received in April, 1948. He testified as to the grip function and the amputation. (Ap. 59.) He stated that penicillin was a recognized treatment for virulent infections. He further testified that there were no neuromas involved in the amputated stump and that the appellee has a lack of 35% grip in the right hand. (Ap. 66.) He further testified that if there were no penicillin or sulfa drugs in the medicine chest of the vessel and that a seaman incurred an infection which did not appear to be serious, the treatment indicated would be bed rest and application of hot soaks to the infected parts; that the continuing of epsom salts soaking treatment was a proper one and in the event that the infection came to a head it would be proper

to lance it to relieve the pressure; that further soaking would reduce the edema in the hand and fingers where the infection was present. (Ap. 67, 68.)

Dr. Merrill Mensor, called by appellant, testified that he examined the appellee and took a history from him; that he found that the appellee had a partially amputated right index finger and that he had a residual stump of $1\frac{1}{2}$ inches, measured from the web of the finger to the end of the stump; that the stump was not tender, and in his opinion very satisfactory as far as the finger was concerned. (Ap. 82.) He further testified that the appellee had a loss of 25 to 30% grip in his right hand. (Ap. 86.) In response to a hypothetical question, Dr. Mensor testified that if a seaman incurred an infection of a finger or hand while aboard a vessel and, if there was no penicillin aboard the vessel and the seaman was afforded treatments of hot epsom salts soaks, it would be his opinion that the seaman was not seriously or dangerously ill, and had been afforded the proper and recognized treatment. (Ap. 88, 89.) Dr. Mensor further testified that if he were called by a vessel by radio service to give medical advice in the treatment of an infection such as appellee had, his instructions to the vessel would be identically that course of treatment which was given to the appellee by the officers on the vessel "Pecos." (Ap. 90.)

SPECIFICATIONS OF ERROR RELIED UPON.

The assignment of errors upon which appellant relies is set forth in the Apostles at pages 160 and 161, and is summarized in the following statement of questions involved in the appeal of said appellant:

1. Appellant contends that there is no evidence in the record sufficient to sustain the findings in favor of the appellee on the proposition that the appellant negligently failed to provide the vessel with an adequate medicine chest.

2. The appellant contends that there is no evidence in the record sufficient to sustain findings in favor of appellee on the ground that appellant failed to replenish the medicine chest at ports of call.

3. The appellant contends that there is no evidence in the record sufficient to sustain findings in favor of appellee on the ground that appellant was negligent in failing to avail itself of medical advice by means of radio service.

4. Appellant contends that there is no evidence in the record sufficient to sustain findings in favor of appellee on the proposition that appellant negligently failed to divert the vessel and put in at the port of Manila.

5. That the trial Court committed error in its findings of fact and conclusions of law by adopting the findings proposed by appellee. (Ap. 18, 19.)

ARGUMENT OF THE CASE.

1. APPELLANT CONTENDS THAT THERE IS NO EVIDENCE IN THE RECORD SUFFICIENT TO SUSTAIN THE FINDINGS IN FAVOR OF THE APPELLEE ON THE PROPOSITION THAT THE APPELLANT NEGLIGENTLY FAILED TO PROVIDE THE VESSEL WITH AN ADEQUATE MEDICINE CHEST.

Title 46, U.S.C.A. 666 provides as follows:

“Every vessel belonging to a citizen of the United States, bound from a port in the United States to any foreign port, or being of the burden of seventy-five tons or upward, and bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall be provided with a chest of medicines; * * * shall also be provided with, and cause to be kept, a sufficient quantity of lime or lemon juice, and also sugar and vinegar, or other anti-scorbutics * * *”

Title 46, U.S.C.A. 667 provides as follows:

“If, on any such vessel, such medicines, medical stores, lime or lemon juice, or other articles, sugar, and vinegar, as are required by Section 666 of this title, are not provided and kept on board, as required, the master or owner shall be liable to a penalty of not more than \$500; * * *”

There is nothing contained in the above-quoted statutes with respect as to what medicines should be kept in the medicine chest of a vessel, except that it states that the vessel “shall be provided with a chest of medicines” and further provides that “a sufficient quantity of lime or lemon juice, and also sugar and vinegar, or other anti-scorbutics” be served to each seaman.

The libel contains no allegation concerning an inadequate medicine chest or the failure of the vessel to maintain an adequate medicine chest. (Ap. 3, 7.) This charge of negligence first appears in the findings of fact. (Ap. 18.) The appellee at the conclusion of the trial of the case before the district judge, did not ask for leave to amend his libel to conform to the proof.

The first time that appellee raised the question as to the adequacy of the medicine chest was at the time of trial when counsel for appellee brought forth this particular line of testimony from the appellee as well as from Dr. Cox. Johnson, the Master of the vessel, and Coward, the Chief Mate of the vessel, were not present at the time of trial, their depositions having been taken in anticipation of trial, due to the fact that they would not be within the jurisdiction of the Court during the trial. The question of inadequacy of the medicine chest was never raised by counsel for appellee during the questioning of Captain Johnson or Chief Mate Coward. At the time of trial counsel for appellant had no opportunity to rebut the testimony of appellee and Dr. Cox on this point as the question had not been raised at the time the depositions of Johnson and Coward were taken. Counsel for appellant attempted to elicit some information along this line from Mr. Gardner, the Second Mate of the vessel, but as he was not the medical officer aboard the vessel his testimony did not shed much light upon this point. The issue of inadequacy of the medicine chest was not therefore properly before the Court, inasmuch as

it was not an allegation of negligence charged against the appellant in the libel, and such evidence should not be considered by this Court. *Welch v. Fallon*, 181 Fed. 875, at page 878.

There are no cases which hold that there has to be any particular type of medicine or drug in the medicine chest of a vessel. The statutes above cited are safety statutes, and merely require a medicine chest to be kept aboard a vessel where a doctor or physician is not in attendance aboard said vessel. This duty to furnish a medicine chest arises out of the ancient duty of the owner of the vessel to furnish "cure" to an injured seaman.

Laws of Oleron, Art. VI and VII;

Aguilar v. Standard Oil Co., 318 U.S. 724;

The Osceola, 189 U.S. 158.

-
2. THE APPELLANT CONTENDS THERE IS NO EVIDENCE IN THE RECORD SUFFICIENT TO SUSTAIN FINDINGS IN FAVOR OF APPELLEE ON THE GROUNDS THAT THE APPELLANT FAILED TO REPLENISH THE MEDICINE CHEST IN PORTS OF CALL.

The testimony in this regard is to the effect that when the vessel left ports of the United States for Japan, there was an ample supply of gauzes, drugs, tablets, penicillin and sulfa aboard the vessel, and placed in the medicine chest; that the penicillin and sulfa drugs were plentiful when the vessel arrived at Japan the first time (Ap. 131); and that when the vessel left Yokosuka, Japan, for the Persian Gulf, the penicillin was used for the first time as some of

the men had contracted venereal diseases (Ap. 131, 132.) The vessel ran out of penicillin on the return voyage from the Persian Gulf to Japan; after the vessel arrived at Japan penicillin was obtained in Japan for treatment of seamen on the voyage from Japan to the United States. (Ap. 131.) There is no evidence in the record that failure to use penicillin was the proximate cause of appellee's present condition.

3-4. APPELLANT CONTENDS THERE IS NO EVIDENCE IN THE RECORD SUFFICIENT TO SUSTAIN FINDINGS IN FAVOR OF APPELLEE ON THE GROUND THAT APPELLANT WAS NEGLIGENT IN FAILING TO AVAIL ITSELF OF MEDICAL ADVICE BY MEANS OF RADIO SERVICE OR DIVERT THE VESSEL TO THE PORT OF MANILA.

Prior to the time that Clavel received the injury to the finger of his hand the "Pecos" was bound from the Bahrein Islands in the Persian Gulf to Yokosuka, Japan. (Libelant's Exh. 1b, p. 5, 6.) Captain Johnson testified that on April 28, 1948, the "Pecos" was at its closest point to Manila, a distance of some 260 miles; that on April 29, 1948, the vessel was some 570 miles distant from Manila, and that on April 30 the vessel was some 900 miles distant from Yokosuka, Japan. Following April 30, 1948, the vessel proceeded on its course to Japan, arriving there on May 3, 1948. The medical log which was read into evidence shows that on April 27 and April 28, 1948, appellee's hand was drained and dressed, and that on succeeding days up to May 3 appellee's hand was drained and dressed. Captain Johnson, master of the vessel, had training as

an orderly in various hospitals and had taken part in preparation for operations, cauterizing and irrigations. (Lib. Exh. 1a, p. 4.) Captain Johnson considered that the usual treatment for scratches to fingers and infected parts which became swollen and red was the application of hot epsom salts solution to draw out the inflammation and to cause the swelling to subside. (Lib. Exh. 1a, p. 8); that the appellee's hand and finger never at any time showed any evidence of blood poisoning (Lib. Exh. 1b, p. 16); that he never considered the condition of the finger serious enough to divert to any port. (Lib. Exh. 1b, p. 16 and 18.)

Both Dr. Cox and Dr. Mensor agreed that applications of hot epsom salts solution to the injured finger of appellee would draw the infection to a head and that when the infection came to a head the proper treatment would be to lance the same to prevent the further spread of infection, and that further soaking would reduce the edema in the hand and finger. (Ap. 67, 68, 89, and 90.) It was the testimony of Dr. Mensor that the master and chief officer of the vessel rendered and afforded proper treatment to the appellee in curbing the infection in his finger and hand; he further stated that if a radio message were directed to him as to the treatment to be given an infection of this nature he would have prescribed the same treatment as was provided, and further testified that such treatment was appropriate and proper. (Ap. 89, 90.)

5. **THERE IS NO EVIDENCE IN THE RECORD TO SUSTAIN THE FINDINGS IN FAVOR OF APPELLEE THAT APPELLANT FAILED TO RENDER PROPER MEDICAL CARE AND ATTENTION.**

The injury sustained by appellee was, to all outward appearances, a minor one and was not serious by any nature or stretch of the imagination. The vessel was on its way to Japan, and at the time appellee first received a scratch on his finger the vessel was some nine days from the port in Japan to which it was bound. When appellee first presented himself for treatment on April 25, the finger appeared to be scratched and the injury a minor one. The appellee was given the recognized treatment by the medical officers of the vessel. Appellee was hospitalized at Japan, but rejoined the vessel at his own request when the "Pecos" left Japan bound for the States. The appellee's finger was dressed and treated on the return voyage from Japan to the United States. In August, 1948, an amputation of the portion of the right index finger was performed. The fact that appellee suffered an amputation some three months *after* the injury to the finger was not foreseeable at the time he received his injury. The injury was a minor one, which, in the exercise of reasonable judgment on the part of the captain was not sufficient to cause a diversion or to radio for medical advice as the captain had the matter of treatment well in hand. The vessel is not an insurer of the safety of every seaman who receives a minor scratch or cut. Hindsight cannot be the basis of liability for failure to render medical care and attention in a case where the orig-

inal injury is minor in nature and one which could be well taken care of by treatment aboard the vessel.

In the case of *The Iroquois*, 194 U.S. 240, the master of a sailing vessel bound for San Francisco was not chargeable with fault in failing to put back a distance of 480 miles from the place of the accident to Port Stanley, to secure surgical attendance for a seaman who was disabled by an accident while the vessel was rounding Cape Horn. In that case it was held as follows:

“What is the measure of the master’s obligation in cases where the seaman is *severely injured* while the ship is at sea has been made the subject of discussion in several cases; but each depends so largely upon its own peculiar facts that the rule laid down in one may afford little or no aid in determining another, depending upon a different state of facts.” (Emphasis added.)

It has been stated on numerous occasions that the measure of the master’s obligation in cases where a seaman is *severely injured* while the ship is at sea depends largely upon their own particular facts.

Brock v. Standard Oil Company of New Jersey,
33 Fed. Supp. 353;

Barlow v. Pan Atlantic S.S. Corporation, 101
Fed. (2d) 697 (C.A. 2);

The Iroquois, 194 U.S. 240;

The Shenandoah, 134 Fed. 304.

The master is merely required to exercise reasonable judgment in determining the extent of a seaman’s injuries and in determining the necessity of

diverting the vessel and placing him under the care of a physician at some near port. This raises three questions: (1) The seriousness of the injury; (2) the judgment of the master as to deviation, and (3) the probability of obtaining medical attention at the port of diversion.

In *The Shenandoah*, 134 Fed. 304, a seaman received a lesion in the region of his hip joint which was not apparent and could not have been discovered except by a surgeon, although in fact the libelant's injury was serious and painful. The Court, in commenting upon the exercise of reasonable judgment on the part of the master stated as follows:

“The master was only required to exercise a reasonable judgment as to the extent of libelant's injuries, and as to the necessity of placing him under the care of a physician at some near port. In the case of *The Iroquois*, 113 Fed. 964, the court, in discussing the extent of the master's obligation when a seaman is injured at sea in the discharge of his duties, said:

‘Of course, if the vessel were so far at sea as to make it uncertain whether she could reach the nearest port in time to benefit the sufferer, or if the master had no reason to believe that the sickness or injury was serious, he would not be chargeable with negligence for proceeding on his course, giving to the seaman such care as his knowledge and the conveniences on board the vessel would permit. When there is no physician to consult, the master must necessarily determine, as best he may, whether the injury or sickness is such as to endanger life

or limb; and he cannot be charged with negligence simply because he erred in judgment as to the necessity for putting into port, when the nature of the disease, or the extent of the injury was obscure, and its serious character would not have been apparent except to a physician or surgeon.' "

In the case of *Barlow v. Pan Atlantic S.S. Corporation*, 101 Fed. (2d) 697 (C. A. 2), the plaintiff seaman fell while on the vessel, injuring himself. One of the officers took the plaintiff to the first mate's room and another seaman was placed in the room and told by the officers to watch the injured seaman. The following day the injured seaman was taken to the Marine Hospital, where he complained of soreness in his chest, and it was then determined that he had received a serious injury to the brain and spinal cord. The injured seaman brought an action against the defendant steamship company, alleging, among other counts of negligence, that of failure to provide prompt, adequate and proper medical treatment. The Court denied liability for this cause of negligence, stating as follows:

"The argument is that the libellant's injuries were aggravated by failure to send him to the hospital until the following morning and that second mate Ellis was negligent in not realizing the severity of the injury and summoning the hospital ambulance at once. But on the evidence we can find no evidence of negligence. Barlow received the ordinary type of simple first aid treatment, which is all that can reasonably be ex-

pected from officers of a vessel having no professional doctor. After bathing and attempting to sterilize the wounds, Ellis suggested calling the ambulance, but Barlow protested against being sent to a hospital. He was able to walk back to his quarters in the forecastle and Ellis took this as evidence that he did not require hospitalization. Not every broken head, even if the blow is severe enough to render the victim temporarily unconscious, requires professional medical attention. Barlow had quickly come to, and after treatment was able to talk rationally and to walk to his quarters. Ellis also took the precaution to warn Barlow's roommate to keep an eye on him and to report if he became restless or suffered pain during the night. While a trained physician might have realized the advisability of sending the wounded man to a hospital at once, a ship's officer cannot be held to the same standard of skill as a professional medical man. Ellis showed as much care and judgment as can reasonably be expected under the circumstances. Hence the cause of action alleged in the second count was not proved."

The case which is nearly on all fours with the matter at bar is that of *Brock v. Standard Oil Company of New Jersey*, 33 Fed. Supp. 353. In that case the injured seaman brought an action for damage on three counts, the second count alleging that the vessel failed to provide proper medical and surgical care and attention. The libelant became involved in an argument with another seaman and as a result injured his hand. The injured seaman went to the Captain's quarters shortly after midnight to get a

certificate of admission to the Marine Hospital and returned to the vessel after being refused admission to the Marine Hospital. The captain of the vessel supplied libellant with epsom salts and unguentine and gave him instructions as to the treatment of his hand. The vessel left the port where it was loading and during the voyage from Everett, Massachusetts to New York the libellant performed his regular duties. The libellant was given daily treatments by the captain, and was instructed to soak his hand in a hot solution of epsom salts. The voyage from Everett, Massachusetts to New York took a little more than three days, and when the vessel arrived at New York libellant went to the Marine Hospital on Staten Island where his injury was diagnosed as a fracture of the thumb of the left hand. In denying liability on the count for failure to provide proper medical and surgical care and attention, the Court stated as follows:

“I also find as a fact that the respondent was unaware of the extent of libellant’s injuries, and that the respondent gave adequate attention to the libellant during the course of the voyage to New York under the circumstances. It was not until after the completion of the voyage that it was learned that the libellant’s thumb was fractured.”

In *Brock v. Standard Oil Company of New Jersey* (supra), the injury was one involving the hand, as in the case at bar; the treatment offered and rendered by the vessel was the same as in the instant case; the resultant effect of the injury was not apparent in either the case at bar or the *Brock* case until a later date.

In the case of *The Van Der Duyn*, 261 F. 887, a seaman was injured on board a vessel while the vessel was at sea. Approximately five days later the vessel arrived at Cuba, where the seaman was examined by a doctor but not sent to a hospital, and the seaman returned to the vessel for a voyage to New York. Approximately two weeks after the accident the seaman was taken to a hospital in New York for x-rays, and a fracture of the arm was revealed by the x-rays. The seaman brought an action for failure to give medical care and attention. The Court held that while the ship's officers had made an error of diagnosis, at the same time they had exercised the reasonable care which was required of the officers of a vessel and stated as follows:

“The ship will not be held responsible for an error of judgment on the part of the officers, if their judgment is conscientiously exercised with reference to conditions existing at the time. It is only where the external extent of the injury in question should have moved them to ascertain its real nature, when they could do so without serious diversion of the course, and at comparatively trivial expense, that the courts have permitted liability to attach to the vessel.”

The Court further stated as follows:

“The requirement of a ship is to give reasonable medical treatment under all circumstances. There must be reasonable ground to believe that consequences more serious than the swelling, pain, and suffering which ordinarily attend a fracture or a severe laceration resulted, before liability be imposed.”

CONCLUSION.

It is respectfully contended that the appellant has sustained its burden of demonstrating that the final decree entered in favor of appellee Clavel against appellant Joshua Hendy Corporation was a miscarriage of justice and that this Honorable Court, in the exercise of its powers as an Appellate Court and as a Court empowered to consider all of the facts on trial *de novo*, should make and enter a final decree in favor of appellant Joshua Hendy Corporation, reversing the decree heretofore entered in favor of appellee Clavel.

Dated, San Francisco, California,
February 5, 1951.

Respectfully submitted,

JOHN H. BLACK,

EDWARD R. KAY,

HENRY W. SCHALDACH,

Attorneys for Appellant.



No. 12,706

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOSHUA HENDY CORPORATION (a Corporation), sued herein as Pacific Tankers, Inc. (a Corporation),

Appellant,

vs.

OTTO GEORGE CLAVEL,

Appellee.

BRIEF FOR APPELLEE.

L. CHAS. GAY,

311 California Street, San Francisco 4, California,

Proctor for Appellee.



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BRIEF FOR APPELLEE.

**APPELLANT'S ASSIGNMENTS OF ERROR ARE
INSUFFICIENT TO RAISE ANY ISSUE.**

At the outset Appellee desires to point out that Appellant's purported assignments of error are legally insufficient to raise any issue for review, and that the appeal should be dismissed on that ground. The assignments of error are set forth on pages 160 and 161 of the transcript, and for convenience are printed below.

"I. The District Court erred in entering a decree in favor of libelant and appellee and

against respondent and appellant on his cause of libel.

II. The District Court erred in entering a decree denying respondent and appellant a decree against libelant and appellee.

III. The District Court erred in making and entering conclusions of law and order for decree made and entered in the above-entitled cause.

IV. The decree herein in favor of libelant and appellee and against respondent and appellant is against the law.

V. The District Court erred in failing to adopt the proposed findings of fact and conclusions of law offered by respondent and appellant, which are in accordance with the evidence and the law applicable to the case.

VI. The District Court erred in not rendering a decree in favor of respondent and appellant and against libelant and appellee.”

Rule 35 of this Court provides that appellant shall file with the Clerk of the Court below with his petition for appeal an assignment of errors, numbering each, and shall set out *separately and particularly* each error asserted and intended to be urged.

Under a similar rule it has been held that an assignment that the Court erred in entering a decree sustaining the libel is not a sufficient assignment of error. *The Blakeley*, 285 Fed. 348.

In *The Connact*, 299 Fed. 229, it was held that an assignment that the trial Court erred in entering a

decree against the appellant was too general to merit consideration or to present anything for review.

And see *Cook v. Smith*, 187 F. 538, holding that the review of a decree in admiralty is limited by the assignments of error; *The Golden Gate*, 52 F. (2d) 397, holding that a defense not raised in the answer, nor argued below, nor assigned as error will be ignored; *In re Lee Transit Corp.*, 37 F. (2d) 67, holding that a finding is conclusive on an appellee who fails to file assignments of error.

None of the purported assignments of error are sufficient to raise any issue on this appeal. They are mere conclusions of the pleader, and the appeal should be dismissed on this ground.

FACTS OF THE CASE.

The facts of this case are adequately and accurately set forth in the Findings of Fact made by the District Court, printed in the Transcript of Record, beginning at page 15. All findings are supported by a great preponderance of the evidence, and most by undisputed evidence.

On April 23, 1948, while the tanker Pecos was approaching Singapore, on her voyage from Bahrein Island to Yokosuka, the libelant, boatswain on the vessel, scratched the index finger of his right hand. He cleaned the wound and applied band-aids. On the following day the injured finger was swollen and

painful and showed evidence of infection. He informed the Mate of the vessel, who permitted him to knock off work and instructed libelant to come to him for medical care if the finger did not improve.

On April 25, 1948, the finger was swollen and painful and the swelling extended into libelant's right hand. As time passed the swelling extended into the right forearm, and the hand became discolored, turning blue, green and yellow, and libelant had a fever. The libelant reported to the Master of the vessel for medical care on April 25, 1948. He asked the Master to give him penicillin and was told that there was none; he asked to be put ashore for hospitalization in Manila, and the Master replied that that was not necessary. He then requested the Master to radio for medical advice, and was informed that that was not necessary.

The Mate gave libelant Epsom Salts and directed him to soak his hand in a hot solution, and later applied a "drawing salve" and a "healing powder" to the wound. On April 27, 1948, the Mate made an incision in libelant's index finger for the purpose of removing pus, and later removed pus from the back of libelant's hand. On the day the incision was made the vessel was less than one day's run from Manila. The finger was swollen to twice its size, and the hand was discolored and swollen and the swelling extended into the forearm. The index finger developed a "crook" until it became permanently bent at a right angle to the hand.

The vessel arrived at Yokosuka on the afternoon of May 3, 1948, but libelant was not hospitalized until May 4, although he asked for immediate hospitalization. At the hospital in Yokosuka he was given a course of penicillin treatments, together with sulfa drugs. The doctor in attendance wished to amputate the entire index finger down into the hand, but libelant would not consent, and after about four days' treatment libelant was permitted to return to the "Pecos." On the return voyage he asked for penicillin treatments but they were not afforded him. On return to the United States libelant reported to the Marine Hospital in San Francisco. He was an inpatient for 21 days, and among other things received penicillin treatments. About the middle of September, 1948, a portion of the right index finger was amputated. Libelant was unable to return to work until February, 1949. The stump of the finger is still sensitive and painful, and the motion of the middle finger is limited and grip of the right hand permanently reduced 35%.

STATEMENT OF ISSUES ON APPEAL.

We have already pointed out that the assignments of errors filed in the District Court are insufficient to raise any issue on appeal. Appellant, in filing its Statement of Points in this Court merely adopted the assignments of errors "heretofore filed." (Tr. p. 163.)

In Appellant's brief, under the heading "Statement of Case" (page 3) Appellant states the question involved as follows:

"Must a vessel *always* deviate to obtain medical treatment for a *minor* injury to a seaman's finger, where such deviation in the conscientious and best judgment of the Master is unnecessary."

That, of course, is an unfair and inaccurate statement of the question involved, if it be assumed that there is any question at all. In the first place, the injury was not a minor one. Secondly, it is not a question of whether a vessel must always deviate, but whether deviation was necessary under the facts of this case. Thirdly, the question assumes that the Captain acted conscientiously, and the trial Court found otherwise.

Still more important is that Appellant raises a question only as to whether the ship *should have deviated* to Manila to obtain medical treatment, whereas the trial Court based its decree on the general failure of the appellant to provide Appellee with proper and adequate medical care, as well as on the inadequacy of the medicine chest, the failure to replenish same at ports of call, or by contacting other vessels, and the failure to avail itself of medical advice by means of radio. The failure to put libelant ashore at Manila was only *one ground* of negligence found, and Appellant has limited its appeal to that ground. Since only one finding of negligence is attacked, the decree should be affirmed.

The question which should have been posed is whether there was any evidence sufficient to sustain any of the findings of negligence found by the trial Court, and Appellant should have undertaken to overcome the presumption in favor of those findings. This Appellant has not done and could not do.

**THE INJURY WAS SERIOUS, AND THE URGENCY
OF PROPER TREATMENT WAS KNOWN.**

Appellant argues that, despite libelant's urgent requests for expert medical attention, the master of the vessel was not negligent in disregarding libelant's pleas and taking him on to Yokosuka. It is stated that Clavel's hand and finger never at any time showed evidence of blood poisoning, and that the master did not consider the condition serious. (Brief p. 15.) It is argued: (Brief p. 16) that "the injury sustained by appellee was, to all outward appearances, a minor one and was not serious by any nature or stretch of the imagination." "The injury was a minor one, which, in the exercise of reasonable judgment on the part of the captain was not sufficient to cause a diversion or to radio for medical advice as the captain had the matter of treatment well in hand."

But let us look at the facts:

Clavel testified that on April 26th "the hand was discolored and the arm started to swell up." (Tr. p. 38.) On April 27th "the finger was swollen up to twice its size. The hand was altogether swollen and

the whole arm was swollen. That is when the Mate decided to cut the finger." (Tr. p. 39.) "The hand had started to get all red, green and blue." (Tr. p. 75.) There was pus in the hand (Tr. p. 40) and the finger was stiff and bent at a right angle. (Tr. p. 41.) "The whole hand had swole up and puffy." (Tr. p. 76.)

The deposition of the Mate was taken by respondent, and he corroborates Clavel's statement. When Clavel first came to him the finger was "swollen and started to get discolored with red around it." (Dep. p. 20.) "The reason I started the drawing salve was because his *arm* started to look to me like it might be swelling." "I lanced it. That took the swelling out of his arm and got rid of all that pus out of his hand, on the back of his hand. *His hand had started to turn green and yellow* on here * * *" (Dep. p. 23.) "I went back to that epsom salts solution afterwards, because I wasn't sure myself when the wound was open—I didn't know whether that ointment might cause some more poisoning in there."

The ship's report of illness, dictated by the Captain, contains the notations: "Finger swollen to twice normal size—patient running a fever." "Badly infected finger." (Lib. Ex. B-2, p. 23.)

The foregoing facts were outlined to two doctors who testified at the trial. Dr. Mensor testified for respondent (Tr. p. 94):

"I would think, if a man had all those things, we might even anticipate gangrene. I would say it was a serious condition.

Q. It would be a condition that you as a doctor would not think could properly be handled by merely soaking it in Epsom Salts, isn't that true?

A. Yes."

Asked about the use of penicillin or sulfa drugs, Dr. Mensor replied (Tr. p. 95): "I would say if it had been available they certainly should have been used, yes." He stated that if penicillin was not available, sulfa should have been used, if available.

Dr. Cox also testified that the symptoms indicate a cause for major concern, indicating the vital need of expert medical care and for a course of penicillin treatment. (Tr. p. 69.)

A virulent infection is best treated by complete immobilization and the administration of antibiotics such as penicillin, streptomycin, or sulfanilimide, and sometimes they are given in combination. (Tr. pp. 61, 66, 95.) Ichthymol ointment should not have been used. (Dr. Cox, Tr. p. 67.)

THE SHIP'S MEDICINE CHEST WAS INSUFFICIENT.

Title 46, U. S. C. A., sec. 666, is a statute enacted to promote the health and safety of seamen. It provides:

"Every vessel belonging to a citizen of the United States, bound from a port of the United States to any foreign port * * * shall be provided with a chest of medicines."

This, of course, means that an adequate supply of medicines shall be provided and maintained. There was ample testimony that penicillin and sulfa drugs were normally included in the medical supplies of tankers at the time in question.

“The onus probandi in respect to the sufficiency of the medicine chest lies on the owner.”

See

The Nimrod, Fed. Cas. No. 10,207;

Harden v. Gordon, 11 Fed. Cas. No. 6047.

And it is held that the violation of a safety statute such as this constitutes negligence as a matter of law, and that it is not necessary specifically to plead the violation of the statute. See *Booker v. Alaska Steamship Co.*, 1936 A.M.C. 153 (dealing with a violation of 46 U. S. C. A., sec. 669, clothing and heat, which is in the same group of statutory provisions as the above, relating to medicine chest).

QUESTION OF ADEQUACY OF MEDICINE CHEST WAS LITIGATED WITHOUT OBJECTION, AND MATTER IS NOT COVERED BY ASSIGNMENTS OF ERROR.

Appellant, at pages 11-13 of its brief, complains of the alleged failure of the libel to allege the inadequacy of the medicine chest and asserts that appellant had no opportunity to rebut libelant's testimony on this subject.

The libel alleges generally the negligent failure to supply libelant with proper medical care and medica-

tion. The evidence was presented without objection and the issue fully litigated. No request for a continuance or other motion was made either at the trial or thereafter. There is no assignment of error on the point. Nor is there even a statement that any more or different evidence could be produced.

The cited case of *Welch v. Fallon*, 181 Fed. 875, involves different facts and pleadings, and is merely an opinion of the District Court stating his reasons for refusing to consider an issue which he concluded was not pleaded. Presumably a proper objection had been made, but in any event it furnishes no authority for raising the question for the first time on appeal.

**THE MASTER NEGLIGENTLY FAILED TO CONTACT OTHER
SHIPS TO REPLENISH THE MEDICINE CHEST.**

The Court below found, on undisputed testimony, that "The respondent negligently failed to replenish the medicine chest at ports of call, or by contacting other vessels. That the vessel was traversing a busy trade route and could and should have contacted other vessels in the vicinity. That respondent negligently failed to administer the appropriate medicines, to-wit, penicillin and sulfa drugs, if in fact there were any on board the ship. * * * That libellant's condition was the proximate result of improper and inadequate medical care, as aforesaid."

This finding is not covered by any assignment of error, and is not mentioned in Appellant's brief. Appellant prefers to argue the inconvenience of putting

into port, and ignores the evidence supporting the above finding. The decree should be sustained on this ground alone.

CLAVEL SHOULD HAVE BEEN PLACED ASHORE AT MANILA.

With customary disregard for the facts, Appellant states that on the day Clavel's finger was lanced the Captain "did not consider its condition serious enough to divert the ship as the vessel was then only four days from its destination in Japan." (Brief p. 6.) It is stated that on *April 28* the Pecos "was 260 miles northwest of Manila; this was the closest point it got to a port before arrival in Japan." (Brief p. 6.)

As a matter of fact, it appears from the medical log of the ship that the finger was drained and dressed on April 27, 1948. (Tr. p. 139.) The vessel arrived at Yokosuka on May 3, 1948, and Clavel was not taken to the hospital until May 4, 1948. (Tr. p. 140.)

It was therefore 7 or 8 days after the hand was lanced before Clavel reached the hospital, depending on whether April 27 is included in the calculation.

It further appears from Captain Johnson's testimony (Lib. Ex. 1-B, p. 27) that it was on *April 27, 1948*, when the ship was nearest to Manila. The vessel made better than 300 miles a day, and it can readily be seen that it was not too much of a hardship for the ship to deviate to Manila. However, that would not have been necessary, as the ship was on a busy route and it would have been possible to contact other ships for medicines or attention of a ship's doctor. (Tr. p. 151.) The Court found, from all the testi-

mony, that the respondent should have done one of these things, and its finding is conclusive.

**MASTER NEGLIGENTLY FAILED TO RADIO FOR ADVICE
AND TO USE AVAILABLE MEDICINE.**

Enough has been said to show that Clavel's request that the Master of the vessel radio for medical advice should have been granted. Furthermore, the second mate of the vessel testified that although the ship had run out of penicillin at the time of Clavel's injury he believed they still had sulfa. (Tr. p. 132.) Why, then, was it not given? Although inferior to penicillin, the failure to use it warranted the District Court's finding of negligence on that ground.

AUTHORITIES ON DUTY TO PROVIDE MEDICAL CARE.

There is no occasion to comment on the authorities cited by Appellant on the general subject of the duty of the shipowner to furnish medical care, and to deviate if necessary to obtain it. It is, as has so often been stated, a question of the particular facts involved. We add to the citations the case of *De Zon v. American President Lines*, 318 U.S. at 667, 87 L. ed. at 1071:

"The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations. The *Iroquois*, 194 U.S. 240-242, 48 L.ed. 955-957, 24 S. Ct. 640. When the seaman becomes

committed to the service of the ship the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seamen for illness or injury during the period of the voyage, and in some cases for a period thereafter. This duty does not depend upon fault. It is no merely formal obligation and it admits of no merely perfunctory discharge. Its measure depends upon the circumstances of each case * * * the seriousness of the injury or illness and the availability of aid. Although there may be no duty to the seaman to carry a physician, the circumstances may be such as to require reasonable measures to get him to one, as by turning back, putting in to the nearest port although not one of call, hailing a passing ship, or taking other measures of considerable cost in time and money. Failure to furnish such care, even at the cost of a week's delay, has been held by this Court to be a basis for damages."

See *Wittekoppe v. N. Y. etc. Co.*, 189 Fed. 920:

"The libellant * * * claims that he asked, and expected, to be put ashore at Pernambuco. The officers deny this, and it may be that he said nothing, or that the officers did not understand him. But I do not think in such a case the ship-owner is exonerated even if the seaman acquiesced in not obtaining proper surgical treatment. It is the duty of the master in such a case to use his own judgment and to do what is necessary under the circumstances, and I think in this case the master was bound to know that he, with the best intentions, was not competent to so treat the broken wrist as to prevent the result which occurred."

Sec, also, 56 Corpus Juris at 1073, listing many cases where the problem of deviation to obtain medical care for an injured seaman was considered.

“Where the welfare of the seaman requires it, and the circumstances of the ship permit, the master should deviate from the voyage, and put into port or hail a passing ship in order to secure proper care for a disabled seaman.”

CONCLUSION.

Appellee therefore submits that the appeal should be dismissed, (1) because no errors have been assigned, (2) because some grounds of negligence found by the trial Court, which alone sustain the judgment, have not even been mentioned or discussed by Appellant, and (3) because each of the trial Court's findings and the decree entered thereon are amply supported by evidence, and no other decree could properly be entered. Appellant has been compelled to distort and misstate the evidence and issues in order to give any appearance of substance to its appeal and it ignores much of the testimony presented by the libellant below. Even by so doing it has not overcome the well-established presumption in favor of the trial Court in admiralty. The decree appealed from should be affirmed.

Dated, San Francisco, California,
March 2, 1951.

Respectfully submitted,

L. CHAS. GAY,

Proctor for Appellee.





